85-1068

No.

Supreme Court, U.S.
FILED
DEC 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1985

JOHN DEMJANJUK,
Petitioner,

vs.

JOSEPH PETROVSKY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

I. The Extradition Court Erroneously Asserted Subject-Matter Jurisdiction in the Extradition Proceedings Against Petitioner When Under 18 U.S.C. Section 3184 It Was Incompetent to Consider the Subject-Matter Extraterritorial Acts (Offenses Alleged) As Charged Under Israel's Municipal Nazi and Nazi Collaborators (Punishment) Law of 1950, Thereby Unlawfully Restraining Petitioner of His Liberty, Which Unlawful Restraint the District and Circuit Courts Failed to Remedy on Habeas Corpus Review. When:

(A) Congress Has Vested Subject-Matter Jurisdiction Over "War Crimes" Exclusively in the Military Courts and

(B) The Issue of Subject-Matter Jurisdiction Over Genocidal Acts by United States Civilian Courts Remains an Undecided Political Question in the United States.

II. Whether the District Court Erred in Finding That the Offenses Alleged in the Request for Extradition Were Among Those Mentioned in Article II of the United States-Israel Convention on Extradition.

III. Whether the District Court Erred in Finding That the Offenses Charged by Israel Were Extraditable Under Article III of the United States Convention on Extradition Provided the U.S. Secretary of State Exercised His Discretion to Do So.

IV. Whether the District Court Ruled in Error That There Was Evidence Sufficient to Establish the Identity of "Ivan Grozny" and to Establish Probable Cause for the Commission of the Alleged War Crimes and Genocidal Act in Israel's Complaint by the Petitioner-Appellant.

PARTIES TO THE PROCEEDINGS

1. John Demjanjuk
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2. Joseph Petrovsky, Warden
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3. Edwin Meese
   United States Attorney General
   Washington, D.C.

4. George Schultz
   Secretary of State
   Washington, D.C.

5. United States District Court
   Northern District of Ohio
   Cleveland, Ohio

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These Opinions are reproduced in the Appendix.

GROUNDS FOR SUPREME COURT JURISDICTION

Jurisdiction of the United States Supreme Court is invoked under the following facts: This case originated as an international extradition in the District Court for the Northern District of Ohio, which Court found petitioner extraditable under 18 U.S.C. § 3184. On April 15, 1985, a petition for writ of habeas corpus under 28 U.S.C. § 2144 was timely filed before that Court and denied on May 18, 1985. An appeal from this denial was taken to the Sixth Circuit Court of Appeals on June 4, 1985. The Sixth Circuit affirmed the Courts below on October 31, 1985. This petition is filed within 90 days of that date. This Court's particular jurisdiction to review the Sixth Circuit Court of Appeals' decision is conferred by 28 U.S.C. § 1254(1), which allows for review of Federal "cases in the courts of appeal."

STATUTES, TREATIES AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 3184:

§ 3184. Fugitives from foreign country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign govenment, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

18 U.S.C. § 3190:

§ 3190. Evidence on hearing

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any

extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

United States-Israel Convention on Extradition, 14 U.S.T. 1707 (1963):

(Reproduced in Appendix)

Art. I, § 8, cl. 10, United States Constitution:

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque or Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

STATEMENT OF THE CASE

On October 18, 1983, the Magistrate's Court in Jerusalem, Israel issued an arrest warrant for John Demjanjuk on charges under paragraphs 1-4 of Israel's Nazi and Nazi Collaborator's (Punishment) Law 5710-1950, based on an Israeli National Police request for warrant made the previous day. The witness statements accusing petitioner identified him only as "Ivan Grozny" of the Death Camp Treblinka, Poland. On November 18, 1983, the United States Attorney for the Northern District of Ohio, acting on behalf of the State of Israel, filed a Complaint for Extradition in the District Court, containing a certification from Jeffrey H. Smith, United States Department of State, that the charges were within the United States-Israel Extradition Convention, 14 U.S.T. 1707 (1963).

The District Court, per Chief Judge Battisti, requested the International Human Rights Law Group, David Carliner, Director, to act as *amicus curiae*. After filing of numerous briefs, including defense motions for recusal based on Judge Battisti's prior conduct in the case, a final hearing was held on March 15, 1985. On April 15, 1985, Judge Battisti certified petitioner extraditable. On April 25, 1985, a petition for writ of *habeas corpus* was filed, and subsequently denied on May 17, 1985. On June 3, 1985, an appeal from this ruling was filed in the Sixth Circuit, which by opinion of October 31, 1985, affirmed the District Court.

Petitioner here seeks certiorari in this Court to review the issues raised below and the decisions of the extradition and *habeas corpus* Court below.

ARGUMENT

I. The Extradition Court Erroneously Asserted Subject-Matter Jurisdiction in the Extradition Proceedings Against Petitioner When Under 18 U.S.C. Section 3184 It Was Incompetent to Consider the Subject-Matter Extraterritorial Acts (Offenses Alleged) As Charged Under Israel's Municipal Nazi and Nazi Collaborators (Punishment) Law of 1950, Thereby Unlawfully Restraining Petitioner of His Liberty, Which Unlawful Restraint the District and Circuit Courts Failed to Remedy on Habeas Corpus Review. When:

(A) Congress Has Vested Subject-Matter Jurisdiction Over "War Crimes" Exclusively in the Military Courts and

(B) The Issue of Subject-Matter Jurisdiction Over Genocidal Acts by United States Civilian Courts Remains an Undecided Political Question in the United States.

Petitioner is restrained of his liberty pending *habeas corpus* review of the extradition magistrate's determination that he is extraditable to Israel to face charges under Section 1-4 of Israel's Nazi and Nazi Collaborator (Punishment) Law of 1950 (hereinafter the Nazi (Punishment) Law of 1950). The charges set forth in the Nazi (Punishment) Law of 1950, reproduced in the Appendix, include war crimes, crimes against humanity, crimes against the Jewish people (Section 1), crimes against persecuted persons (Sections 2 and 4) and membership or affiliation with an enemy organization during the Nazi regime (Section 3). The United States-Israel Extradition Treaty of 1963, 14

U.S.T. 1707 (hereinafter the Convention on Extradition) reproduced in the Appendix at A142, does not list any of these crimes among its extraditable offenses, while 18 U.S.C. section 3184, the United States Code provision effectuating our extradition treaties with other sovereigns, states that a charge must be sustained under the terms of the applicable treaty before a certificate of extraditability may issue. Petitioner here states that he nowhere questions the State of Israel's sovereign capacity to legislate its municipal law. His arguments, rather, address themselves to the competency of a United States extradition magistrate to find Petitioner Demjanjuk extraditable on the Israeli charges.

The extradition magistrate, once presented with the United States Attorney's complaint, had to address whether the charges in the Israeli Warrant described offenses for which extradition may lie, 18 U.S. Section 3184, *Shapiro v. Ferrandina,* 478 F.2d 894, 907-908 (2d Cir., 1973), *Gallina v. Fraser,* 278 F.2d 77, 78 (2d Cir., 1960), *Branch v. Raiche,* 618 F.2d 843, 848 (2d Cir., 1980), *Factor v. Loubenheiner,* 290 U.S. 276, 298 (1933), *Collins v. Loisel,* 259 U.S. 309, 314 (1922). The Israeli Warrant charged Petitioner with offenses against its Nazi (Punishment) Law of 1950. Before he could reach the issue of extraditability, the extradition magistrate had to determine whether he had subject-matter jurisdiction over the acts alleged.

A. Congress has vested jurisdiction over "war crimes" exclusively in the military courts

Petitioner will first address the "war crimes" charge. Magistrate Brown in deciding *The Matter of the Extradition of Andrija Artukovic,* CV 84-8743-R (D.C.C.D. Cal., March 5, 1985) rejected war crimes as a basis for Artukovic's extradition to Yugoslavia, ordering the United States

Attorney to obtain a Yugoslavian charging document alleging murder against the respondent in order to sustain the extradition action, slip op. at 16. Similarly, the court deciding *In Re The Extradition of Ryan,* 360 F. Supp. 270 (E.D. N.Y., 1973), *aff'd* 478 F.2d 1397 (2d Cir., 1973), found Mrs. Ryan extraditable on the West German charges of multiple acts of murder, arising from her conduct as a warden of the Lublin concentration camp. West Germany never attempted extradition on the basis of war crimes, since it had, while part of the Third Reich, territorial jurisdiction over Lublin, Poland.

In the case at bar, the extradition magistrate's inability to adjudicate war crimes is brought into sharp relief by Israel's claim of extraterritorial jurisdiction. The Nazi (Punishment) Law of 1950, Sections 2, 4(a). Israel has not charged Petitioner with acts that may be either common-law felonies or war crimes, but only war crimes, and derives any jurisdiction it may have from the acts' character as war crimes. Thus, subject-matter jurisdiction here is an all or nothing proposition—either Petitioner should have been tried criminally for war crimes here years ago, or Israel cannot extradite him on such charges. *In Re Yamashita,* 327 U.S. 1, 10 (1946).

To try those accused of war crimes committed in Europe during World War II, the Allied Powers executed the London Agreement of August 8, 1945, XV Trials of War Criminals at 8, 9 (1949) 59 U.S. Stat. 1544. This document was an agreement between the governments of the United States, France, Great Britain and the Soviet Union to establish an International Military Tribunal (IMT).

Part of this agreement was the Charter of the IMT, XV Trial of War Criminals, 10, 59 U.S. Stat. 1546, which

in Article 6 defined crimes against the peace, or initiation of wars of aggression; war crimes, or violations of the laws or customs of war; and crimes against humanity, or persecution on political, racial or religious grounds. XV Trials of War Criminals at 11.

The predicate to the London Agreement was the Moscow Declaration (1943) 1 Trials of War Criminals, which stated in part:

> "those . . . men and members of the Nazi party who . . . have taken a consenting part in . . . atrocities, massacres and executions *will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries*". (*emphasis supplied.*)

This provision was carried forward into the IMT Charter's Articles 10 and 11, which provided that "the *competent* national authority of any Signatory—may (charge) any person convicted by the tribunal, with a crime other than membership in a criminal organization and any such court may . . . impose punishment independent and additional. . . ." The competent national authority in the United States for the trial of war crimes are the military courts, only, *In Re Yamashita, supra,* syllabus 2(b), 327 U.S. at 13.

Thus, in the United States, only a military court has competent subject-matter jurisdiction over war crimes, *In Re Yamashita, supra; Ex Parte Quirin,* 317 U.S. 1 (1943), because Congress under Article I, Section 8, Cl. 10 United States Constitution vested military courts with exclusive competence, *Yamashita, supra* at 7. The IMT, created by the agreement of the Allied sovereigns, authorized by its charter the competent national authorities to

try Nazi war criminals after the IMT had done its work. The competent authority in the United States is the military courts authorized by Congress. Control Council Law No. 10, December 20, 1945, Official Gazette of the Control Council for Germany, No. 3, at 50, reprinted in 15 Dep't St. Bull. 862 (1946).

The Treaty governing the extradition at bar states that the grant or refusal of extradition:

> "shall be made *in accordance with the domestic law of the requested party*", Article IX. (*emphasis supplied.*)

The domestic law of the requested state, the United States, vests exclusive subject-matter jurisdiction over war crimes in the military courts. Hence, a civilian extradition magistrate cannot exercise any jurisdiction over a war crimes charge. In the one case where a like extradition was requested, that charge was turned aside, *Artukovic, supra* at 16. Under 18 U.S.C. Section 3184, the magistrate must act in conformity with the Treaty. The Treaty and our national law preclude the extradition magistrate's exercise of subject-matter jurisdiction over war crimes.

B. The procedural issue of subject-matter jurisdiction over genocidal acts remains an undecided political question in the United States

Petitioner will now address the genocidal acts charge. The United States recognizes international law as part of United States law, Article I, Section 8, Cl. 10, *The Paquete Habana,* 175 U.S. 667 (1900), *The Scotia,* ..... U.S. (14 Wall.) 170, *United States v. Smith,* ..... U.S. ..... (1820), *Filartiga v. Pena-Irala,* 630 F.2d 737 (2d Cir., 1980), *Tel-Oren v. Libyan Arab Republic,* 727 F.2d 774 (D.C.C., 1984). The issue presented in this case is whether the genocidal

acts of which petitioner-appellant is charged are crimes of an international character and, if so can an extradition magistrate take subject-matter jurisdiction over these charges absent a Congressional mandate to do so. As outlined above, the IMT Charter created a very specific authority to try and punish Nazi war criminals, among those crimes included genocidal acts. The IMT tried these criminals under the mandate of an international agreement between sovereigns, *cf.* London Agreement, *supra.*

In addressing this issue, a Court must look to our law of foreign relations for subject-matter jurisdiction. Petitioner-appellant will demonstrate that our law cannot reasonably provide an extradition magistrate with subject-matter jurisdiction over charges of genocidal acts against petitioner. The first source to which an extradition magistrate must look in ascertaining the existence of subject-matter jurisdiction is the law "of the place where the person brought shall be found," Article V, Treaty, 14 U.S.T. at 1710. As reflected in the Israeli warrant of arrest, that place was Ohio. Ohio law does not provide for subject-matter jurisdiction over genocidal acts among any of its laws. Hence, under Ohio law and, therefore, under Article V of the treaty, the extradition magistrate lacked subject-matter jurisdiction over the changes, *Shapiro v. Ferrandina,* 478 F.2d 894, 901 (2d Cir., 1973). Subject-matter jurisdiction must be determined by the Treaty's terms, *Gallina v. Fraser,* 278 F.2d 77, 79 (2d Cir., 1960), *Factor v. Laubenheimer, supra,* 290 U.S. at 300 (1933). Thus, under the first rough assessment of subject-matter jurisdiction, the extradition magistrate lacked jurisdiction, *Collins v. Loisel,* 259 U.S. 309, 314 (1922).

Since there is no Ohio law prohibiting genocidal acts that asserts the extraterritorial jurisdiction in a fashion

paralleling that of Israel's law, the extradition magistrate may next look to federal law, since, that law applies in Ohio, *Branch v. Raiche*, 618 F.2d 843, 848-850 (1st Cir., 1980), *Cucuzzella v. Kelikoa*, 638 F.2d 105, 107-108 (9th Cir., 1980).

Looking to federal law, the extradition magistrate could find only that the United States will prosecute for a federal offense if a "detrimental effect" occurred within the United States, *Matter of Marc Rich & Cop., A.G.*, 707 F.2d 663, 666 (2d Cir., 1983) either to the government itself or to individuals within the United States, *United States v. Egan*, 501 F. Supp. 1252, 1257 (S.D. N.Y., 1980), citing *Strassheim v. Milton Daily*, 221 U.S. 280, 282 (1911), *United States v. Postal*, 589 F.2d 862, 865 (5th Cir., 1979), *United States v. Bowman*, ... U.S. 94 (1922). Where this adverse effects test has not been satisfied, the so-called "objective territorial" test, subject-matter jurisdiction over the alleged offense has been rejected and the accused discharged, *Yenkichi Ito v. United States v. James Robinson*, 515 F. Supp. 1340 (S.D. Fla., 1981). The extra-territorial genocidal acts with which petitioner-appellant is charged by Israel under its Nazi (Punishment) Law of 1950, therefore, cannot comport with the United States' objective territorial scope of jurisdiction, since Israel's law does not require any effect within Israel or on Israeli citizens. Under this analysis, which proceeds from standing United States precedent, the extradition magistrate lacked subject-matter jurisdiction of the alleged genocidal acts.

This being the case, under 18 U.S.C. Section 3184, the extradition magistrate must then look to United States foreign relations law to determine if subject-matter jurisdiction lies, this is so because 18 U.S.C. Section 3184, as

much as 28 U.S.C. Section 1350, *Tel-Oren v. Libyan Arab Republic, supra,* effectuates our foreign relations law within the United States. Critically our foreign relations with respect to extraditions are defined by Treaty, 18 U.S.C. Section 3184. Hence, the extradition magistrate must first look to any treaties that may inform his decision under 18 U.S.C. Section 3184. The Treaty that has most bearing on his statutory decision is our Extradition Treaty with the State of Israel, 14 U.S.T. 1707 (1963). Nowhere in that treaty are extraterritorial genocidal acts enumerated among the extraditable offenses. The United States Senate ratified the treaty in 1963 and it was entered into force in December, 1963. The ratification was made pursuant to Article XIX of the treaty, which stated that it would "enter into force upon the exchange of ratifications".

Hence, under the Treaty in force, 14 U.S.T. 1707 (1963) Article XIX, *supra,* no subject-matter jurisdiction over alleged genocidal acts could arise through the extradition magistrate's authority under 18 U.S.C. Section 3184. Looking to another treaty, the Genocide Convention of 1948, 78 United Nations Treaty series 377, which codified the international procedural law regarding genocidal acts, its terms also define when a sovereign becomes a High Contracting Party thereto in Article XI, stating that:

> "The present Convention shall be ratified, and the instruments of ratification shall be deposited with Secretary general of the United Nations."

The United States never satisfied the requirements for ratification, hence is not a High Contracting Party to the Convention. However, the Convention remains in force among the sovereigns that have ratified it. The United States is not such a sovereign, so has never pledged to

extradite those accused of genocidal acts, Article VII, Genocide Convention.

Absent ratification, the extradition magistrate may not consider the Convention's terms in determining his subject-matter jurisdiction over genocidal acts, 18 U.S.C. Section 3184. Because there exists a treaty that provides the procedure for adjudication of the subject-matter of genocidal acts, to which the United States is not a party, the extradition magistrate has no authority to look to the customary law of nations for the definition or procedure regarding this subject matter, 18 U.S.C. Section 3184, *Paquete Habana, supra, The Scotia,* ..... U.S. (14 Wall.) 170 (1871), since the United States' procedural treatment of genocidal-acts subject-matter remains a political question that is within the sole purview of the Executive and Legislative Branches of Government, *Colegrove v. Green,* 328 U.S. 549, 553-554 (1964), *Baker v. Carr,* 369 U.S. 186, 203 (1962).

The essential error of the extradition court in asserting jurisdiction over these genocidal acts is that he has taken jurisdiction over an "international crime" that in the United States remains undefined by statute or any international agreement to which it is presently a party, see 18 U.S.C. 1651, 20 U.S.T. 2941 (1982). The Executive and Congress of the United States have recognized universal jurisdiction only over those international crimes that the United States Legislative and Executive have formally defined, and the Courts have decided cases with those definitional constraints, *Tel-Oren, supra.* No court before has passed on criminal conduct based on the definitions of "international crimes" provided by another sovereign's municipal state law.

In the case at bar, the extradition magistrate supported his claim that universal jurisdiction over the geno-

cidal acts of which petitioner-appellant is accused by invocation of the IMT. *In Re Demjanjuk*, 612 F. Supp. at 556-57. He ruled that the IMT trials stood for recognition of universal jurisdiction by the United States of the crimes of which petitioner-appellant is accused. *Demjanjuk, id.* The establishing documents of the IMT, the London Agreement, *supra* and the charter of the IMT, *supra*, contradict the extradition magistrate's claim, as well as that of the reviewing District and Sixth Circuit Court. The framers of the London Agreement, *supra*, and the Charter of the IMT, *supra*, codified three classes of crimes: crimes against the peace, war crimes, and crimes against humanity. *Demjanjuk, id.* at 556, n.11.

Under the establishing documents, subject-matter jurisdiction was taken on strictly *territorial* principles, since all of the lands in which the crimes occurred were under the control of one or the other the Allied Powers, signatures to the London Agreement, at the time jurisdiction was taken. Universal jurisdiction over the crimes, as *delicto jus gentium*, was never considered. The terms of these documents reinforce this when the United States assumed its obligation to return the war criminals to the states in which they committed their crimes, or try the major policy-making criminals in Germany, the most appropriate forum for their trial. Charter of the IMT, *supra*. The IMT's assertion of jurisdiction thus was grounded on traditional territorial principles, carefully defined and applied pursuant to the multilateral agreement chartering the tribunal. Their procedure was ratified by the United Nations in 1946, G.A. Res. 95, U.N. Doc. A/64/Add. 1 at 188 (1946); 5 U.N. GADR Supp. (No. 12) at 11, U.N. Doc. A/1316 (1950).

The utter misapplication of the Nuremburg precedent opened the gate for the extradition and *habeas corpus*

courts below to fashion *ad libi* jurisdiction principles over the alleged genocidal acts *ad libitum*. Such fashioning flies in the face of 18 U.S.C. Section 3184, *Collins v. Loisel, supra* and *Shapiro v. Ferrandina, supra*.

Thus, based upon the IMT authority that flatly contradicts their claim on the one hand, and a treaty that is of no force or effect in the United States, on the other, the Courts below took subject-matter jurisdiction over the genocidal acts of which petitioner-appellant is charged. This conduct by the extradition court has resulted in the unlawful restraint of petitioner-appellant's liberty. The Circuit review, despite a difference of language and author, tracked almost exactly with argument of the Extradition Court, thereby continuing that unlawful restraint.

Thus, in conclusion, the Extradition Court committed error in taking subject-matter jurisdiction over the Nazi (Punishment) Law of 1950 charges because the adjudication of war crimes is within the exclusive jurisdiction of the military courts and the procedural treatment of genocidal-acts subject-matter remains an undecided political question. In like manner, the Courts reviewing the extradition on habeas corpus erred for the same reasons to conclude that the petitioner-appellant was lawfully restrained of his liberty when, as demonstrated above, under statute, Treaty and the Constitution of his restraint was and is unlawful. . .

II. The District Court Erred in Finding That the Offenses Alleged in the Request for Extradition Were Among Those Mentioned in Article II of the United States-Israel Convention on Extradition.

After announcing that it had acquired subject-matter jurisdiction to hear evidence of the criminality of war

crimes/genocidal offenses alleged in Israel's, Request for Extradition, offenses recognized by the extradition court in its threshold ruling as "international crimes", *delicto jus gentium,* the Court then ruled that the offenses alleged were among those mentioned in Article II of the Treaty, and that these offenses were extraditable under Article III unless otherwise time barred. *In Re Demjanjuk,* 612 F. Supp. at 554-63. The Court ultimately ruling that petitioner-appellant was extraditable only for *murder. Demjanjuk, id.* at 558-63.

All parties agree that from the application of its municipal state Nazi Law arose Israel's assertion of extraterritorial criminal jurisdiction in this case. Israel clearly lacks municipal and/or international extraterritorial jurisdiction over the offense of "*inter alia,* murder" as charged in the Government's original Complaint. Because the charges contained in Israel's arrest warrant (complaint) were not within the treaty the Extradition Court ruled that the charge contained in the Government's original Complaint would be the charge for which the Government was seeking petitioner-appellant's extradition and thus the charge that would be tested against the requirements of 18 U.S.C. Section 3184 and Article II of the Treaty.

The District Court ultimately certified petitioner-appellant extraditable for the specific acts alleged by Israel which rise to the level of war crimes, crimes against humanity, crimes against the Jewish people and crimes against persecuted people. *Demjanjuk, id.* at 560-61. For purposes of expedient interpretation of Article II of the Treaty, however, the Court noted that the Government Complaint duly and legally charged the accused with crimes of "murder and malicious wounding; inflicting grievous bodily harm", all crimes which fall facially within the treaty. *Demjanjuk, id.* at 546.

It can be seen, therefore, that since the Government's Complaint does not charge petitioner-appellant with a crime committed within the jurisdiction of Israel and since the Israeli Complaint (Arrest Warrant) does not charge petitioner-appellant with an offense enumerated in Article II of the Convention on Extradition, the express requirements of 18 U.S.C. Section 3184 and the Convention have not been met. Treaty, 14 U.S.T. 1707 (1963). The District Court properly stated the rule applicable under these circumstances when it held that "if Israel lacks jurisdiction (over the crimes alleged), the United States *cannot* (*emphasis added*) extradite Respondent to Israel. *Demjanjuk, id.* at 554.

III. The District Court Erred in Finding That the Offenses Charged by Israel Were Extraditable Under Article III of the United States-Israel Convention on Extradition Provided the U.S. Secretary of State Exercised His Discretion to Do So.

The pertinent portions of Article III of the Convention on Extradition between the United States and Israel are set forth:

> When the offense has been committed outside the territorial jurisdiction of the requesting party, extradition need not be granted unless the laws of the requested party provide for the punishment of such an offense committed in similar circumstances

Having erroneously decided that the offense (*inter alia,* murder) charged in the United States Attorney's Complaint was among those offenses enumerated in Article II of the Convention on Extradition, in order to facially meet the requirements of 18 U.S.C. Section 3184, the Court then had to test this charge against the require-

ments of Article III. The alleged crimes charged having occurred in Poland, the Court found that Article III was applicable in this case. *Demjanjuk, id.* at 561.

After reviewing the provision of the Convention on Extradition, the Court ruled that the extraterritorial offenses charged by Israel were not punishable in the United States "under similar circumstances", dual criminality being absent in this case. Nonetheless, the District Court made the determination that petitioner-appellant was extraditable. Extradition in this case was found not to be mandatory, as a matter of law, but at the sole discretion of the United States Secretary of State. *Demjanjuk, id.* at 560-61.

As precedent to justify its decision to certify war crimes and genocidal offenses as extraditable crimes under United States Law, the Extradition Court relies, in part, upon precedent in the *Artukovic* case, *supra.* Upon analysis, however, the Court in *Artukovic* provides a well reasoned holding contrary to the District Court's procedural ruling which certified as "international crimes" the offenses contained in Israel's Request for Extradition.

Yugoslavia in its request for extradition, had initially charged Artukovic with war crimes. The Treaty of Extradition between the United States and Yugoslavia does not enumerate war crimes as extraditable offenses, *Artukovic, id.* at 9. Like the United States-Israel Convention on Extradition, it does incorporate the common law principle of dual criminality. Since no United States Law proscribes war crimes, the Court found Artukovic *not extraditable for war crimes. Artukovic* at *id.* Due to the Extradition Court's acknowledged lack of jurisdiction over war crimes and genocide, the government then sought Artukovic's extradition *only* on charges of common law murder, a crime enumerated in the United States-

Yugoslavian Treaty of Extradition and contemplated by United States Law, *Artukovic* at *id.* The reticence of the *Artukovic* court regarding the charge of war crimes was recently underscored when Yugoslavia refused United States' request to extradite Mohammed Abbas, the alleged mastermind of the act of piracy committed aboard the Italian cruise ship Achille Lauro, that claimed the life of United States citizen Leon Klinghoffer. Yugoslavia granted Abbas asylum despite the fact that his alleged crime is recognized by all civilized nations as criminals. Yugoslavia's jurisdictional ruling underscores the uncertainty of definition among sovereigns, in all but a very few international crimes.

The extradition of Hermine Ryan to the Federal Republic of Germany is further illustrative of U.S. policy regarding extradition for alleged war crimes, *In Re Extradition of Hermine Ryan,* 360 F. Supp. 270 (E.D. N.Y.), *aff'd,* 478 F.2d 1397 (2d Cir. 1977). Under a 1930 Treaty of Extradition, the West German Government requested the extradition of the Austrian born, naturalized U.S. citizen, Hermine Braunsteiner Ryan, for crimes committed while serving as a warden at a concentration camp in Lublin, Poland. Although suspected by the Federal Republic of Germany of war crimes, Mrs. Ryan was charged with murder under the German Penal Code, a civilian law in effect throughout the period of the National Socialist (Nazi) Regime. *Ryan, id.* at 272. Moreover, the West German Government in *Ryan* asserted jurisdiction over the alleged wartime crimes based upon the traditional principle of *territoriality* not *universality. Ryan* at *id.* The Extradition Courts in the *Ryan* and *Artukovic* cases, unlike the District Court in the instant matter, carefully avoided infringements upon Congress' exclusive power to define offenses against the laws of nations, Article I, Section 8, cl. 10, United States Constitution.

United States policy regarding recognition of post-Nuremberg criminal jurisdiction over alleged crime committed during time of war was clearly set out in a request by Italy for the extradition of U.S. Army Sergeant LoDolce. The Government of Italy charged in that case that the crime of murder had been committed in Italy by the accused, behind German lines at a time when Italy was an ally of the United States. The Extradition Court deciding *In Re LoDolce*, 106 F. Supp. 455 (W.D.N.Y., 1952) ruled that since Italy did not then control the sovereign territory where the crime was committed, the Treaty between the United States and the Republic of Italy *could not* be extended to permit extradition. *LoDolce id.* at 460. In all cases cited in *LoDolce,* the requesting state's lack of territorial jurisdiction at the time of the alleged criminal acts was outcome determinative on the issue of jurisdiction to adjudicate and punish those acts. Universality was never considered by the Extradition Court as a basis for jurisdiction in that case.

The Extradition Court stated that to exclude war crimes and genocide from a "fair interpretation" of the provision of the Convention on Extradition would restrict Israel's rights under the Treaty, which is disfavored. *Accord Factor,* 290 U.S. at 294. The Court also concluded that the surrender of the accused in this case would not impair "any legitimate public or private interest". *Demjanjuk, id.* at 563. The District Court did not discuss the municipal and international law consequences of holding that the United States is obligated to recognize any foreign state's assertion of territorial or extraterritorial jurisdiction to try any United States citizen before its municipal tribunals based upon that state's charge under an existing extradition treaty of one of the "universal crimes" for which petitioner-appellant was found extraditable.

The District Court's citation of *Valentine, supra* to justify the Court's liberal interpretation of the treaty and *Raiche, supra* as precedent for the finding that petitioner-appellant was accused of a "very serious charge" that should be provided for in the Treaty, are wholly inapposite in this case. Nor do the other cases cited by the District Court provide persuasive support for the Court's decision that a civilian court of extradition is competent to recognize war crimes and genocidal conduct as international crimes, universally punishable by all nations and that these attempted judicial codifications of international law by the Extradition Court are a part of United States law. *Paquete Habana, supra.*

A. Applicability of dual criminality principle

The District Court, in its extradition opinion and later its habeas decision, held that the common law rule of "dual criminality" is inapplicable in the instant case and, therefore, does not act as a bar to extradition, *In Re Demjanjuk, supra,* 612 F. Supp. at 569.

This Court long ago settled the rule that ". . . an offense is extraditable only if the *acts charged* (*emphasis added*) are criminal by the laws of both *countries*". *Collins v. Loisel, supra,* 259 U.S. at 309. The *Branch* court went further when it stated, "the requirement that the acts alleged be criminal in both jurisdictions is central to extradition law. . . .". *Branch v. Raiche,* 618 F.2d at 847.

The extradition and habeas court opinions acknowledge that the rule of dual criminality is absent in this case but in both decisions, the Court ruled that its interpretation of the language of the Convention on Extradition supercedes the rule of law or makes it inapplicable. In other words, the law of the land, is asserted not to be the law of the case.

In support of this ruling of first impression, the Court turns to the *Assarsson* precedent *In the Matter of Assarsson,* 635 F.2d 1237 (7th Cir., 1980). In that case, an extradition court issued a certificate of extraditability when one of the multiple offenses (arson in . :mark) charged by the requesting state was committed outside Swedish territory and as such could possibly have been non-prosecutable under United States Law because the United States does not punish extraterritorial crimes except in limited circumstances. Jurisdiction over the accused and the majority of offenses charged in *Assarsson* was rooted deeply in traditional territorial and "active personality" principles rendering its application wholly inapposite to the case at bar and unsupportive of the extradition's court's ruling that double criminality is inapplicable in this extradition proceeding.

Notwithstanding the lack of support for its holding, the court completes its circular logic by ruling that because the offenses or *acts* charged by Israel in its arrest warrant (complaint) are not prosecutable in the United States and because these offenses are nonetheless found by the Court, via the expedient of the *inter alia* murder charge contained in the Government's Complaint, to fall within enumerated treaty offenses, then this interpretation of the language of the treaty makes the "dual criminality" rule inapplicable. *Demjanjuk, supra,* 612 F. Supp. at 569.

This ruling flies in the face of the law which states "that an offense is extraditable only if the *acts charged* (*emphasis added*) are criminal by the laws of both countries". *Collins v. Loisel, supra; Accord, Branch v. Raiche, supra, Caplan v. Vokes,* 649 F.2d 1336, 1343 (7th Cir. 1981) (". . . no offense is extraditable unless it is criminal in both jurisdictions"). Thus, our courts have stated em-

phatically and repeatedly that: (1) the acts alleged by the requesting state to be extraditable must be criminal in both jurisdictions and (2) this determination can be made only on the basis of the asylum state's (United States) law. This strict requirement of U.S. law has not been met in this case, thereby establishing an independent bar to petitioner-appellant's extradition which cannot be lifted by the ruling of the District Court that the principle of dual criminality is "inapplicable".

The Extradition Court ruled that the test of dual criminality was "inapplicable" to the case at bar. In so doing the Extradition Court failed to meet the dual criminality requirement, having never found the dual criminality necessary under 18 U.S.C. Section 3184 and the Treaty in order to certify petitioner's extraditability. Failing in this task, the Extradition Court caused petitioner-appellant to be unlawfully restrained of his liberty. The Habeas and Circuit Courts, by applying the same logic to avoid this issue, have permitted this unlawful restraint to continue.

B. The ex post facto nature of Israel's Municipal Nazi Law establishes an independent bar to extradition under United States Law.

The Constitution of the United States prohibits the enactment by Congress or state legislatures of an *ex post facto* law in Article I, Section 9, Cl. 3; Section 10, Cl. 1. An *ex post facto* law is one that "punishes, as a crime, an act done before its passage, and when, when committed, was not punishable", *Calder v. Bull*, 3 U S. (3 Wall.) 386, 390 (1798). *See Ex Parte Garland*, 71 U.S. 333, 18 L. Ed. 366 (1866); *cf. Ross v. Oregon*, 227 U.S. 150, 33 S. Ct. 220, 51 L. Ed. 458 (1912); *Frank v. Mangum*, 237 U.S. 309, 59 L. Ed. 969 (1915). Judicial interpretations of Article I, Section 9 and Section 10 United States Constitution have not tempered or limited the prohibition.

This prohibition bars the taking of jurisdiction over the crimes as alleged under the municipal law of the State of Israel for two (2) reasons: (1) such jurisdiction would be asserted where the acts alleged by Israel's complaint are not deemed adjudicatable under current United States Law (ratification of the U.N. Convention on Genocide is still pending), and (2) such extraterritorial criminal jurisdiction would be unconstitutional, because it would recognize that Congress has the power to enact an *ex post facto* law—a power that is expressly denied Congress under the Constitution of the United States.

The sovereign State of Israel came into existence in 1948. Israel's municipal Nazi (Punishment) Law was passed by its Knesset in 1950. Israel has no extraterritorial jurisdiction over acts committed during the National Socialist Regime because at the time of their commission, Israel did not exist as a sovereign state. 15 U.N. SCOR Supp. (April-June 1960) at 35, U.N. Doc. S/4349 (1960).

C. The principles of "dual criminality" and "specialty"

The Court concedes that the dual criminality principle makes an offense non-extraditable unless it is punishable in both the requesting and the requested states' jurisdictions. *Demjanjuk, id.* at 563. Unable to overcome the force of Article V of the Treaty or the principle of dual criminality, the Court merely rules that the treaty provision and the dual criminality principle are both "inapplicable" in this case. *Demjanjuk, id.* at 569.

In conclusion, the Extradition Court never clearly stated the standard applied to probable cause. Such an omission in its analysis demonstrated the unlawfulness of petitioner's restraint of liberty. The reviewing *Habeas*

Corpus Courts in like manner failed to state the probable cause standard applied, thereby, continuing petitioner's unlawful restraint of his liberty, both in the District and Circuit Courts.

IV. The District Court Ruled in Error That There Was Evidence Sufficient to Establish the Identity of "Ivan Grozny" and to Establish Probable Cause for the Commission of the Alleged War Crimes and Genocidal Act in Israel's Complaint by the Petitioner-Appellant

As noted, the District Court, on February 21, 1985 ordered that it would take jurisdiction to hear evidence on Israel's Complaint (Warrant of Arrest). The Complaint charged the offenses of *inter alia*, war crimes, crimes against humanity, crimes against the Jewish people and crimes against persecuted people, committed against these groups in Poland during 1942-43. See A138. The Court ruled that the specified crimes, amounting to group murder, and the acts of murder defined by the Israeli law as war crimes were offenses for which the accused could be extradited under Article III of the Convention on Extradition between the United States and Israel. *Demjanjuk, id.* at 559-62.

The definition of the crimes charged and the application of procedures to punish these crimes contained in the Israeli Nazi (Punishment) Law of 1950 was also deemed by the Court to conform to United States Law because Israel's municipal statute conformed to the Extradition Court's interpretation of the law of nations. *Demjanjuk, id.* at 554.

The District Court stated the rule regarding the burden of proof for identification in this case when it held

that once the extradition warrant was issued, it must be regarded as "presumptively right", thus shifting the burden of overcoming the presumption to the accused *Demjanjuk, id.* at 564. The Court rested this ruling on the holding in *Raftery ex rel. Fong v. Bligh*, 55 F. 2d 189 (1st Cir. 1932), an interstate extradition matter. *Demjanjuk, id.* at 548.

The Court then found that the Israeli Complaint (Extradition Request) had been properly certified by an appropriate United States diplomat and thus the evidence contained therein was immune from evidentiary challenge apart from allegations of non-compliance with the procedural certification requirements of 18 U.S.C. Section 3190 and the requirements as to the form of the Request for Extradition, pursuant to Article X of the U.S.-Israel Convention on Extradition. The Court subsequently ruled that the diplomatic procedures and requirements had been met in the case. *Demjanjuk, id.*

The evidentiary "Nexus" identifying John Demjanjuk as "Ivan Grozny" was then examined by the Court. The Israeli Request for Extradition (Government Exhibit 1) was judged to be "the Complaint" for identification purposes, *Demjanjuk, id.* at 549. In the section of the Request entitled "Identification of Demjanjuk", the Israeli charging document lists the identifications made by four (4) Israeli survivors. Israeli police investigators had shown these four (4) survivor witnesses a single photograph marked with a letter "A" and transcriptions of their prior testimony at petitioner-appellant's 1981 denaturalization hearing. The witnesses then uniformly stated that the picture shown to them was that of the man remembered as "Ivan Grozny" from Treblinka and was the same picture they had identified during their testimony before the District Court in 1981. *Demjanjuk, id.* at 550-52.

Rather than address the threshold issue of subject-matter jurisdiction, or the central, consequent issues of treaty interpretation or even probable cause, the extradition magistrate first considered the accused's "identity". *Demjanjuk, id.* at 547-54. For this reason the Court assembled the identification evidence supplied in Israel's Request for Extradition, applying every available procedural restriction to the review of petitioner-appellant's evidence which demonstrated the mistaken identity in the case, occasioned originally by the Soviet-supplied identification evidence (Trawniki I.D. Card). *Demjanjuk, id.* at 552-54, 564, 566, 569.

The Extradition Court after reviewing this evidence ruled that the affidavits of the four (4) witnesses who testified before him at the 1981 denaturalization hearing sustained the government's burden that John Demjanjuk is the man whose extradition is sought by Israel. *Demjanjuk, id.* at 552.

A. Probable cause

The determination of the standard for weight and sufficiency of evidence required to establish probable cause to believe the accused committed the war crimes/genocidal acts alleged by Israel is held by the Court to be "for the determination of the committing Court", based on "reasonable grounds to believe the accused guilty". *Demjanjuk, id.* at 563.

To arrive at its judgment, the Extradition Court notes that the record contains the affidavits of three (3) Israeli's citizens, two of whom testified before the District Court during petitioner's 1981 denaturalization hearing. The Court describes its function as a limited trier of fact measuring the charges against the weight and sufficiency of

these affidavits to *identify* those criminal *acts* allegedly committed by the accused and determining whether these *acts* constitute the extraditable offense charged in the government's complaint. *Demjanjuk, id.* at 564.

The Court refers to the precedent set in *Shapiro v. Ferrandina,* 478 F.2d 894, *cert. dism'd,* 414 U.S. 884 (1973). Some of the charges in the *Shapiro* case had no cognates under U.S. (N.Y. State) Law and some of the acts alleged were not punishable under U.S. law and thus not extradictable under the dual criminality and specialty requirements. *Shapiro, id.* at 907-08. The Extradition Court acknowledged that a finding of extradictability of *separate charged offenses* is a procedural requirement under *Shapiro. Demjanjuk, id.* at 564.

The Court previously concluded that the weight and sufficiency of the evidence provided by the 1983 affidavits of four (4) Treblinka survivors (Rosenberg, Epstein, Lewkowicz and Czarny) confirming the testimony of three (3) of them during petitioner's 1981 denaturalization hearing regarding the acts and petitioner's identity.

The Court then ruled on the evidence of the *acts* which the petitioner allegedly committed while "at the site and at the time" and whether these acts constituted the extraditable offense of *murder.*

The Court first draws upon the 1981 denaturalization hearing testimony of Elijah Rosenberg, read into the record of the March 12, 1985 extradition proceedings by the government. When Mr. Rosenberg had the opportunity to identify respondent at the petitioner's 1981 denaturalization hearing, he did not do so, nor did witnesses Lewkowicz or Epstein. Joseph Czarny did not testify during the denaturalization hearing.

The Court combined this evidence with Joseph Czarny's 1976 affidavit in Israel. Mr. Czarny's statement was also read into the record of the extradition hearing by the government. Mr. Czarny stated here that he had worked in another camp and recounted statements of other Jewish victims he recalled regarding "Ivan Grozny's" crimes at the Treblinka death chambers. The Extradition Court ruled that Mr. Czarny "saw respondent at Treblinka convey(ing) people (sic) into the gas chambers", *Demjanjuk, id.* at 566.

Ruling on probable cause, the Extradition Court found:

> "It is enough in this case, after examining the statements of just three (3) witnesses, to conclude that there is sufficient evidence to find probable cause that respondent, while serving as a guard at the Treblinka camp in 1942-43, committed murders of: uncounted numbers of prisoners . . . who died of asphyxiation in the gas chambers which respondent operated . . .". *Demjanjuk, id.*

The Court thus ruled that based on the evidence provided in these affidavits, the factual and legal Nexus has been established between the *acts* alleged in the Israeli Complaint (Arrest Warrant) and the *offenses* or *crimes* charged under the Municipal Nazi (Punishment) Law of Israel, namely multiple acts of murder amounting to: crimes against humanity, crimes against the Jewish people and crimes against persecuted people. This "legal Nexus" constituted the finding of probable cause by the Extradition Court.

The Court then examined two (2) supplemental affidavits obtained from witness Rosenberg several months after the Request for Extradition issued. The affidavit dated February 5, 1984 recounted an assault by "Ivan

Grozny" on Mr. Rosenberg's cousin, David Auslander. The denaturalization record is silent as to this assault.

When this affidavit was made, Mr. Rosenberg, at the inquiry of the Israeli police, identified a photograph marked "ER/1" with: "I hereby confirm that this is a picture of *John Demjanjuk,* whom the State of Israel wishes to extradite and bring to trial for the deeds he committed in the years 1942 and 1943 at the Treblinka death camp". In its opinion, the District Court ruled that the photograph marked "ER/1" is *a "circa 1982"* photograph of *John Demjanjuk.* No evidence of record supports the Court's fact-finding. The Extradition Court relied heavily upon Mr. Rosenberg, as it had done before. Mr. Rosenberg by a 1948 affidavit stated that the "Ivan" at the gas chambers was killed by inmates during the heroic Treblinka uprising in August, 1943, *cf.* STEINER, JEAN FRANCOIS TREBLINKA (New York, 1970).

B. Insufficiency of fundamental justice

The hidden danger in this type of case is that a misplaced obective in the Court's ruling that Israel or any other nation may undertake to vindicate the injustices perpetrated during the Nazi era will be confused with the limited objectives of statutory and treaty law in an extradition proceeding.

In *Fedorenko v. United States,* 449 U.S. 490 (1981) Justice Stevens touched upon this very issue in his prophetic dissenting opinion.

> "The gruesome facts recited in the record create what Justice Holmes described as a sort of 'hydraulic pressure' that tends to distort our judgment. Perhaps my refusal to acquiesce in the conclusion reached by highly respected colleagues is attributable in part to

> an overreaction to the pressure. . . . That human suffering will be a consequence of today's venture is certainly predictable; that any suffering will be allayed or avoided is at best doubtful."

The District Court dismissed as non-probative the substantial evidence exonerating the accused. On a consolidated appeal of the judgment and these denials, the Seventh Circuit Court of Appeals agreed to review the evidence heard by the District Court and reversed, restoring Frank Walus' citizenship. *United States v. Walus,* 453 F. Supp. 699 (N.D. Ill. 1978), *rev'd on other grounds,* 616 F.2d 283 (7th Cir., 1980).

Justice Douglas in a different time but in a parallel context, addressed the dangers of acquiescing in the abrogation of procedural protection and in a hearing of this nature when he ruled that:

> "It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of laws, not of men. . . . It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice." *Anti-Fascist Refugee Comm. v. McGrath,* 341 U.S. 123, 177, 179 (1951), (Douglas, J, conc.)

The procedural infirmities that may arise in a probable cause hearing of this kind are apparent. Given that which is at stake, when passions arise from the horrors recalled, individuals' rights may be subordinated to an occasion for recounting the inconceivable crimes of National Socialism. The Courts, however, cannot subordinate constitutional protections to the teaching of this horrible history.

CONCLUSION

For the above-stated reasons, petitioner respectfully requests that this Court grant the writ of certiorari for which he here applies.

Respectfully submitted,

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*The above Petition for Writ of Certiorari includes 2 pages of required Constitutional and applicable Statutes pursuant to Rule 21(.4) thereby complying with page limit.

85-1068

No.

Supreme Court, U.S.
FILED
DEC 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1985

JOHN DEMJANJUK,
Petitioner,

vs.

JOSEPH PETROVSKY, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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APPENDIX

JUDGMENT ENTRY AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed October 31, 1985)

No. 85-3435

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN DEMJANJUK,
Petitioner-Appellant,

v.

JOSEPH PETROVSKY, *et al.*,
Respondents-Appellees.

ON APPEAL from the United States District Court
for the Northern District of Ohio
Decided and Filed October 31, 1985

Before: LIVELY, *Chief Judge;* KEITH and MERRITT, *Circuit Judges.*

LIVELY, *Chief Judge.* This international extradition case is before the court on appeal from the denial of a petition for a writ of habeas corpus.

I.

The petitioner, John Demjanjuk, is a native of the Ukraine, one of the republics of the Soviet Union. Demjanjuk was admitted to the United States in 1952 under the Displaced Persons Act of 1948 and became a naturalized

United States citizen in 1958. He has resided in the Cleveland, Ohio area since his arrival in this country.

In 1981 the United States District Court for the Northern District of Ohio revoked Demjanjuk's certificate of naturalization and vacated the order admitting him to United States citizenship. See *United States v. Demjanjuk,* 518 F.Supp. 1362 (N.D. Ohio 1981), *aff'd per curiam,* 680 F.2d 32 (1982), *cert. denied,* 459 U.S. 1036 (1982). Chief Judge Battisti of the district court entered extensive findings of fact from which he concluded that the certificate and order "were illegally procured and were procured by willful misrepresentation of material facts under 8 U.S.C. § 1451(a)." 518 F.Supp. at 1386.

The district court found that Demjanjuk was conscripted into the Soviet Army in 1940 and was captured by the Germans in 1942. After short stays in several German POW camps and a probable tour at the Trawniki SS training camp in Poland, Demjanjuk became a guard at the Treblinka concentration camp, also in Poland, late in 1942. In his various applications for immigration to the United States the petitioner misstated his place of residence during the period 1937-1948 and did not reveal that he had worked for the SS at Treblinka or served in a German military unit later in the war. In the denaturalization proceedings Demjanjuk admitted that his statements concerning residence were false and that he had in fact served in a German military unit. He steadfastly denied that he had been at Trawniki or Treblinka, though documentary evidence placed him at Trawniki and five Treblinka survivors and one former German guard at the camp identified Demjanjuk as a Ukranian guard who was known as "Ivan or Iwan Grozny," that is, "Ivan the Terrible."

Following the denaturalization order the government began deportation proceedings against Demjanjuk. While these proceedings were underway the State of Israel filed with the United States Department of State a request for the extradition of Demjanjuk. The United States Attorney for the Northern District of Ohio, acting on behalf of the State of Israel, filed a complaint in the district court seeking the arrest of Demjanjuk and a hearing on the extradition request. Following a hearing the district court entered an order certifying to the Secretary of State that Demjanjuk was subject to extradition at the request of the State of Israel pursuant to a treaty on extradition between the United States and Israel signed December 10, 1962, effective December 5, 1963. Bond previously granted Demjanjuk was revoked and he was committed to the custody of the Attorney General of the United States pending the issuance of a warrant of surrender by the Secretary of State.

II.

A.

There is no direct appeal from an order certifying extradition, and the only method of review is by collateral habeas corpus proceedings. *Collins v. Miller,* 252 U.S. 364, 369 (1920); *Caplan v. Vokes,* 649 F.2d 1336, 1340 (9th Cir. 1981). The scope of review in habeas corpus following an extradition order is quite narrow. After differentiating between the requirements of probable cause and proof beyond a reasonable doubt, Justice Holmes delineated the scope of review as follows in *Fernandez v. Phillips,* 268 U.S. 311, 312 (1925):

> The foregoing are general principles relating to extradition, but there are further limits to *habeas*

> *corpus*. That writ as has been said very often cannot take the place of a writ of error. It is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing and *habeas corpus* is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty. *Benson v. McMahon*, 127 U.S. 457. *Re Luis Oteiza y Cortes*, 136 U.S. 330. *Bryant v. United States*, 167 U.S. 104, 105. *Elias v. Ramirez*, 215 U.S. 398, 406.

Though Demjanjuk acknowledges these limitations on the scope of appeal, he presents a somewhat confusing melange of arguments. We will attempt to deal with them separately.

B.

Before reaching the more technical arguments related to jurisdiction of the district court and the question of whether the crimes charged were within the treaty provisions, we deal with the sufficiency of the evidence. As noted, there was sworn testimony by affidavits from six witnesses who were at Treblinka in 1942 and 1943 who identified Demjanjuk. These witnesses stated that Demjanjuk was a guard who herded prisoners into the gas chambers and then actually operated the mechanism which filled the chambers with gas. In addition, several of the witnesses testified that they saw Demjanjuk beat and maim prisoners, some of whom died. Justice Holmes wrote in *Fernandez* that our task is to determine "whether there was *any* evidence warranting the finding that there

was reasonable ground to believe the accused guilty." *Id.* (emphasis added). Surely the evidence in this case satisfied this lenient standard.

This court does not sit to rehear the district court's findings. *Escobedo v. United States,* 623 F.2d 1098, 1101 (5th Cir. 1980). The evidence which the district court relied upon was properly authenticated by an official of the U.S. Department of State as required by 18 U.S.C. § 3190. If properly authenticated, evidence may be received in an extradition case which could not have been received at a preliminary examination under state law. *Collins v. Loisel,* 259 U.S. 309, 313 (1922). Thus it is immaterial that Demjanjuk had no opportunity to cross examine the affiants. The only evidentiary function of the extradition court is to determine whether there is sufficient evidence to justify holding a person for trial in another place. We are satisfied that the district court relied upon admissible evidence in making its determination in this case.

As noted earlier, Demjanjuk was identified by documentary evidence as having been at the SS training camp, Trawniki. Exhibits 5 and 6 were the front and back of a German document which identified "Iwan Demjanjuk" as a guard in an SS unit. The heading showed that it was issued at Trawniki. On appeal Demjanjuk argues strenuously that the Trawniki documents were forged and that the government perpetrated a fraud upon the court by introducing them. This same argument was made in the denaturalization proceedings. The district court discussed this issue at some length in its opinion in those proceedings, and rejected Demjanjuk's contentions. 518 F.Supp. at 1365-69. This issue was also addressed by the district court in denying post-judgment motions for relief.

In making these arguments as to the authenticity of the Trawniki documents, Demjanjuk overlooks one very important fact. The district court in the extradition proceedings made a specific finding that the other evidence identifying Demjanjuk as the guard "Ivan" at Treblinka was sufficient to support the extradition order without reference to the Trawniki document. Thus, even if this documentary evidence had been rejected, the eyewitness evidence alone was found sufficient. Since the district court did not rely on the "Trawniki card," its validity is not before the court. Of course, if we found any support in the record for the claim that the government deliberately offered a forged document as evidence, we would examine the entire proceedings for other evidence of fraud. However, the record before us lends no support to this very serious charge, and we reject it. Witnesses fully qualified to testify on the subject stated their opinions that the Trawniki documents were authentic.

C.

One other issue raised by Demjanjuk requires consideration. On appeal Demjanjuk argues that Judge Battisti, having presided at the denaturalization proceedings, should have recused himself from the extradition hearing. In making this contention Demjanjuk relies on 28 U.S.C. § 455(a) which requires a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The argument is that Judge Battisti, having found that Demjanjuk committed acts which required his denaturalization, might reasonably be considered biased against the same party in a subsequent extradition action. The problem with this argument is that in order to be disqualifying, a judge's alleged bias

must emanate from some "extrajudicial source" rather than from participation in judicial proceedings. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).

Recusal is not required of a judge assigned to consider a habeas corpus action following conviction at a trial over which the judge presided. In fact Rule 4(a) of the rules applicable to actions seeking habeas relief from a federal conviction pursuant to 28 U.S.C. § 2255 requires the petition to be presented to the judge who presided over the petitioner's trial or sentencing. While the present action was brought under a different habeas corpus statute, 28 U.S.C. § 2241, the reasons for the rule apply equally to both. Judicial economy is served by requiring a judge familiar with the case to consider collateral attacks on the judgment. In the absence of some evidence of actual bias or prejudice from some source other than his prior judicial contact with a related case, § 455(a) does not require a judge to disqualify himself in extradition proceedings. *David v. Attorney General,* 699 F.2d 411, 416 (7th Cir.), *cert. denied,* 464 U.S. 832 (1983). We find no evidence of actual bias in this case.

Under a local rule of the Northern District of Ohio Demjanjuk's habeas corpus action was assigned to Chief Judge Battisti. The district court entered a memorandum and order in which it dealt with each of the habeas corpus claims and concluded that Demjanjuk was not being held in violation of the Constitution, treaties or laws of the United States. The effect of the certification to the Secretary of State was stayed and Demjanjuk appealed to this court.

III.

A.

The pertinent portions of the treaty (Convention on Extradition) between the United States and Israel (hereafter the Treaty) found in the first three articles and the thirteenth article, are set forth:

Article I

Each Contracting Party agrees, under the conditions and circumstances established by the present Convention, reciprocally to deliver up persons found in its territory who have been charged with or convicted of any of the offenses mentioned in Article II of the present Convention committed within the territorial jurisdiction of the other, or outside thereof under the conditions specified in Article III of the present Convention.

Article II

Persons shall be delivered up according to the provisions of the present Convention for prosecution when they have been charged with, or to undergo sentence when they have been convicted of, any of the following offenses:

1. Murder.

2. Manslaughter.

3. Malicious wounding; inflicting grievous bodily harm.

. . .

Article III

When the offense has been committed outside the territorial jurisdiction of the requesting Party, extradition need not be granted unless the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances.

The words "territorial jurisdiction" as used in this Article and in Article I of the present Convention mean: territory, including territorial waters, and the airspace thereover belonging to or under the control of one of the Contracting Parties, and vessels and aircraft belonging to one of the Contracting Parties or to a citizen or corporation thereof when such vessel is on the high seas or such aircraft is over the high seas.

. . .

Article XIII

A person extradited under the present Convention shall not be detained, tried or punished in the territory of the requesting Party for any offense other than that for which extradiction has been granted nor be extradited by that Party to a third State unless:

(Exceptions not applicable).

The Israeli warrant on which the extradition request was based was issued pursuant to a request which charged Demanjuk with having "murdered tens of thousands of Jews and non-Jews" while operating the gas chambers to exterminate prisoners at Treblinka. It further asserts that the acts charged were committed "with the intention of destroying the Jewish people and to commit crimes against humanity." The complaint in the district court

equated this charge with the crimes of "murder and malicious wounding [and] inflicting grievous bodily harm," listed in the Treaty. The warrant was issued pursuant to a 1950 Israeli statute, the Nazis and Nazi Collaborators (Punishment) Law. This statute made certain acts, including "crimes against the Jewish people," "crimes against humanity" and "war crimes committed during the Nazi period" punishable under Israeli law. The statute defines these crimes as follows:

> "crime against the Jewish people" means any of the following acts, committed with intent to destroy the Jewish people in whole or in part:
>
> 1. killing Jews;
> 2. causing serious bodily or mental harm to Jews;
> 3. placing Jews in living conditions calculated to bring about their physical destruction;
> 4. imposing measures intended to prevent births among Jews;
> 5. forcibly transferring Jewish children to another national or religious group;
> 6. destroying or desecrating Jewish religious or cultural assets or values;
> 7. inciting to hatred of Jews;
>
> "crime against humanity" means any of the following acts:
>
> murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds;

"war crime" means any of the following acts:

> murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity.

B.

Demjanjuk contends that the district court had no jurisdiction to consider the request for extradition. He advances several discrete arguments in support of this position. As he did in the district court, Demjanjuk maintains that the crime he is charged with is not included in the listing of offenses in the treaty. It is his position that "murdering thousands of Jews and non-Jews" is not covered by the treaty designation of "murder." It is a fundamental requirement for international extradition that the crime for which extradition is sought be one provided for by the treaty between the requesting and the requested nation. 18 U.S.C. § 3184; *Fernandez v. Phillips,* 268 U.S. at 312. We have no difficulty concluding that "murder" includes the mass murder of Jews. This is a logical reading of the treaty language and is the interpretation given the treaty by the Department of State. That interpretation is entitled to considerable deference, as this court noted in *Argento v. Horn,* 241 F.2d 258, 263 (6th Cir. 1957):

> A construction of a treaty by the political department of the government, while not conclusive upon a court called upon to construe such a treaty in a matter involving personal rights, is nevertheless of much weight. [Quoting *Charlton v. Kelly,* 229 U.S. 447, 468 (1913).]

Demjanjuk also argues that the district court had no jurisdiction because there is a requirement of "double criminality" in international extradition cases. The Restatement of the Foreign Relations Law of the United States, Tentative Draft No. 5 (1984) (hereafter "Restatement"), provides in § 487:

> (1) No person may be extradited pursuant to § 486 [The Basic Rule]
>
> * * *
>
> (c) If the offense with which he is charged or of which he has been convicted is not punishable as a serious crime both in the requesting and in the requested state.

The Supreme Court stated in *Collins v. Loisel*, 25 U.S. 309, 311 (1922), "It is true that an offense is extraditable only if the acts charged are criminal by the laws of both countries." See also *Brauch v. Raiche*, 618 F.2d 843, 847 (1st Cir. 1980) ("The requirement that the acts alleged be criminal in both jurisdictions is central to extradition law. . . .").

We believe the double criminality requirement was met in this case. As the Court stated in *Collins v. Loisel*:

> The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular *act* charged is criminal in both jurisdictions.

259 U.S. at 312 (Emphasis added). If the acts upon which the charges of the requesting country are based are also proscribed by a law of the requested nation, the require-

ment of double criminality is satisfied. Murder is a crime in every state of the United States. The fact that there is no separate offense of mass murder or murder of tens of thousands of Jews in this country is beside the point. The *act* of unlawfully killing one or more persons with the requisite malice is punishable as murder. That is the test. The acts charged are criminal both in Israel and throughout the United States, including Ohio. Demjanjuk's argument that to interpret murder to include murder of Jews would amount to judicial amendment of the Treaty is absurd and offensive.

IV.

A.

A separate jurisdictional argument concerns the territorial reach of the statutory law of Israel. Demjanjuk relies on two facts to question the power of the State of Israel to proceed against him. He is not a citizen or resident of Israel and the crimes with which he is charged allegedly were committed in Poland. He also points out that the acts which are the basis of the Israeli arrest warrant allegedly took place in 1942 or 1943, before the State of Israel came into existence. Thus, Demjanjuk maintains that the district court had no jurisdiction because Israel did not charge him with extraditable offenses.

The scope of this nation's international extradition power and the function of the federal courts in the extradition process are set forth in 18 U.S.C. § 3184:

> § 3184. Fugitives from foreign country to United States
>
> Whenever there is a treaty or convention for extradition between the United States and any foreign

> government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

Section 3184 clearly provides that the extradition complaint must charge the person sought to be extradited with having committed crimes "within the jurisdiction of any such foreign government," that is, the requesting state. This same condition is reflected in § 486(a) of the Restatement, which requires the requested state to comply with the request to arrest and deliver a person sought "on charges of having committed a serious crime within the jurisdiction of the requesting state." The question is whether the murder of Jews in a Nazi extermination camp

in Poland during the 1939-1945 war can be considered, for purposes of extradition, crimes within the jurisdiction of the State of Israel.

B.

We look first at the Treaty. Article III provides that when an offense has been committed outside the territorial jurisdiction of the requesting party, "extradition need not be granted unless the laws of the requested party provide for the punishment of such an offense committed in similar circumstances." Demjanjuk maintains that the "need not" language of Article III prohibits extradition in this case because the laws of the United States do not provide punishment for war crimes or crimes against humanity. He places principal reliance on *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936). In *Valentine* the treaty provided in part, "Neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention." *Id.* at 7. The Supreme Court concluded that this language did not grant discretion to the government to extradite citizens of the United States. Demjanjuk argues that the "need not . . . unless" language in the Treaty presently before us similarly precludes an exercise of discretion to extradite for any offense for which the laws of the United States provide no punishment under similar circumstances.

Similar arguments were made by the petitioners in *In re Assarsson*, 635 F.2d 1237 (7th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981), and *In re Assarsson*, 687 F.2d 1157 (8th Cir. 1982). These cases involved two brothers who were charged in Sweden with several crimes, including a scheme to defraud an insurance company by causing a

warehouse in Copenhagen, Denmark to be burned. The extradition treaty between the United States and Sweden contained language identical to that in Article III of the United States-Israeli treaty. The Seventh Circuit construed "need not . . . unless" to mean that the decision whether to extradite is discretionary where laws of the requested party do not provide punishment of the described offense under similar circumstances. The court effectively distinguished *Valentine* as dealing with an unusual treaty which when read in its entirety was logically found to prohibit the extradition of U.S. citizens rather than to grant discretion. 635 F.2d at 1245. The Eighth Circuit adopted the same construction in upholding the denial of habeas corpus relief to the second brother. 687 F.2d at 1163-64.

Valentine construed the treaty to grant no discretion because it was silent on this question whereas many other treaties explicitly granted discretion. "[T]he fact that our Government had favored extradition treaties without excepting citizens puts the omission of the qualifying grant of discretionary power in a strong light." 299 U.S. at 13. No comparison with other existing treaties requires this strict reading of the Treaty in the present case.

We agree with the two courts which have construed the language which is common to the treaties with Sweden and Israel. In our view the treaty language makes two things clear: (1) the parties recognize the right to request extradition for extraterritorial crimes, and (2) the requested party has the discretion to deny extradition if its laws do not provide for punishment of offenses committed under similar circumstances. This provision does not affect the authority of a court to certify extraditability; it merely distinguishes between cases where the requested

party is required to honor a request and those where it has discretion to deny a request. That the specific offense charged is not a crime in the United States does not necessarily rule out extradition.

The Israeli statute under which Demjanjuk was charged deals with "crimes against the Jewish people," "crimes against humanity" and "war crimes" committed during the Nazi years. It is clear from the language defining the crimes, and other references to acts directed at persecuted persons and committed in places of confinement, that Israel intended to punish under this law those involved in carrying out Hitler's "final solution." This was made explicit in the prosecution of Adolph Eichmann in 1961. *Attorney General v. Eichmann,* 36 I.L.R. 277 (Sup. Ct. Israel 1962), reprinted in 2 Friedman, *The Law of War* at 1657-1687 (1972). Such a claim of extraterritorial jurisdiction over criminal offenses is not unique to Israel. For example, statutes of the United States provide for punishment in domestic district courts for murder or manslaughter committed within the maritime jurisdiction (18 U.S.C. § 1111) and murder or manslaughter of internationally protected persons wherever they are killed (18 U.S.C. § 1116(c)). We conclude that the reference in 18 U.S.C. § 3184 to crimes committed within the jurisdiction of the requesting government does not refer solely to territorial jurisdiction. Rather, it refers to the authority of a nation to apply its laws to particular conduct. In international law this is referred to as "jurisdiction to prescribe." Restatement § 401(1).

C.

The law of the United States includes international law. *The Paquete Habana,* 175 U.S. 667, 712 (1900). Inter-

national law recognizes a "universal jurisdiction" over certain offenses. Section 404 of the Restatement defines universal jurisdiction:

> § 404: Universal Jurisdiction to Define and Punish Selected Offenses
>
> A state may exercise jurisdiction to define and punish certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.

This "universality principle" is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offenses. This principle is a departure from the general rule that "the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done." *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

The wartime allies created the International Military Tribunal which tried major Nazi officials at Nuremberg and courts within the four occupation zones of post-war Germany which tried lesser Nazis. All were tried for committing war crimes, and it is generally agreed that the establishment of these tribunals and their proceedings were based on universal jurisdiction. *E.g.* Sponsler, *The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen*, 15 Loy.L.Rev. 43, 48-51 (1968-69).

Demjanjuk argues that the post-war trials were all based on the military defeat of Germany and that with the disestablishment of the special tribunals there are no courts with jurisdiction over alleged war crimes. This argument overlooks the fact that the post-war tribunals were not military courts, though their presence in Germany was made possible by the military defeat of that country. These tribunals did not operate within the limits of traditional military courts. They claimed and exercised a much broader jurisdiction which necessarily derived from the universality principle. Whatever doubts existed prior to 1945 have been erased by the general recognition since that time that there is a jurisdiction over some types of crimes which extends beyond the territorial limits of any nation.

Turning again to the Restatement, § 443 appears to apply to the present case:

> § 443. Jurisdiction to Adjudicate in Aid of Universal and Other Non-Territorial Crimes.
>
> A state's courts may exercise jurisdiction to enforce the state's criminal laws which punish universal crimes (§ 404) or other non-territorial offenses within the state's jurisdiction to prescribe (§§ 402-403).

Israel is seeking to enforce its criminal law for the punishment of Nazis and Nazi collaborators for crimes universally recognized and condemned by the community of nations. The fact that Demjanjuk is charged with committing these acts in Poland does not deprive Israel of authority to bring him to trial.

Further, the fact that the State of Israel was not in existence when Demjanjuk allegedly committed the of-

fenses is no bar to Israel's exercising jurisdiction under the universality principle. When proceeding on that jurisdictional premise, neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations. This being so, Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.

D.

We conclude that the jurisdictional challenges to the district court's order must fail. The crime of murder is clearly included in the offenses for which extradition is to be granted under the treaty. Murder is a crime both in Israel and in the United States and is included in the specifications of the Nazis and Nazi Collaborators (Punishment) Law; the requirement of "double criminality" is met; and, the State of Israel has jurisdiction to punish for war crimes and crimes against humanity committed outside of its geographic boundaries.

Though it was not explicitly argued, we have considered whether recognition of the power of Israeli courts to punish for war crimes committed outside of its national territory violates any right of Demjanjuk under the Constitution of the United States. Demjanjuk had notice before he applied for residence or citizenship in the United States that this country, by participating in post-war trials of German and Japanese war criminals, recognized the universality principle. Israel has chosen to proceed under that principle, and we do not supervise the conduct

of another judicial system. To do so "would directly conflict with the principle of comity upon which extradition is based." *Jhirad v. Fernandina*, 536 F.2d 478, 485 (2d Cir.), *cert. denied*, 429 U.S. 833 (1976). In the absence of any showing that Demjanjuk will be subjected to procedures "antipathetic to a federal court's sense of decency," *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960), this court will not inquire into the procedures which will apply after he is surrendered to Israel. There is absolutely no showing in this record that Israel will follow procedures which would shock this court's "sense of decency," *United States ex rel. Bloomfield v. Gengler*, 507 F.2d 925, 928 (2d Cir. 1974).

V.

The remaining inquiry relates to how the "principle of specialty" applies to this case. This principle requires that the requesting country not prosecute for crimes listed in the treaty but for which extradition was not granted. *Shapiro v. Ferrandina*, 478 F.2d 894, 905 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973). It is also a condition found in Article XIII of the Treaty, which provides that a person extradicted thereunder shall not be tried or punished by the requesting party "for any offense other than that for which extradition has been granted."

The district court clearly certified that Demjanjuk was subject to extradition solely on the charge of murder. Though some of the acts which Demjanjuk is charged with may also constitute other offenses listed in the treaty, he may be tried in Israel only on that charge. However, the particular acts of murder for which he may be tried depend upon Israeli law. Israel may try him under the provisions of the Nazis and Nazi Collaborators (Punish-

ment) Law for "crimes against the Jewish people" ("killing Jews," a species of murder), "crimes against humanity" ("murder . . . committed against any civilian population") and "war crimes" ("murder . . . of civilian population of or in occupied territory"). The principle of specialty does not impose any limitation on the particulars of the charge so long as it encompasses only the offense for which extradition was granted.

We have discussed the principle of specialty because it was argued by Demjanjuk and we have attempted to deal with every issue raised. However, we feel constrained to note that there is a serious question whether Demjanjuk has standing to assert the principle of specialty. The right to insist on application of the principle of specialty belongs to the requested state, not to the individual whose extradition is requested. *Berenguer v. Vance,* 473 F.Supp. 1195, 1197 (D.D.C. 1979). See also *Shapiro v. Ferrandina,* 478 F.2d at 906, where the court recognizes this rule of international law while proceeding in a habeas appeal to remedy the failure of the magistrate to separate extraditable and non-extraditable offenses.

CONCLUSION

The district court did not err in denying Demjanjuk's petition for a writ of habeas corpus. Under established principles of international law the request by the State of Israel for extradition of Demjanjuk was within the provisions of the Treaty. The district court also correctly determined that it had jurisdiction of the matter and that the evidence presented was sufficient to sustain the charge as required by 18 U.S.C. § 3184. The district court properly certified to the Secretary of State that Demjanjuk is subject to extradition to Israel.

Neither the district court nor this court is empowered to order the extradition of any person. Extradition is an act of the Executive Branch. "The ultimate decision to extradite is a matter within the exclusive prerogative of the Executive in the exercise of its powers to conduct foreign affairs." *Escabedo v. United States,* 623 F.2d at 1105 (citations omitted). A decision to attach conditions to an order of extradition is within the discretion of the Secretary of State, not the courts.

The judgment of the district court is affirmed.

MEMORANDUM AND OPINION OF THE UNITED STATES DISTRICT COURT

(Filed May 17, 1985)

No. C85-1226

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN DEMJANJUK,
Petitioner,

vs.

JOSEPH PETROVSKY, Warden, *et al.*, Federal Prison Medical Facility Springfield, Mo.
Respondents.

MEMORANDUM OPINION AND ORDER

BATTISTI, *C.J.*

This matter is before the Court today on John Demjanjuk's Petition for Writ of Habeas Corpus (filed April 25, 1985) challenging the April 15, 1985 certificate of extraditability.[1]

1. John Demjanjuk's counsel filed a Petition for a Writ of Habeas Corpus by a Prisoner in Federal Custody in the Northern District of Ohio on April 25, 1985. The petition was assigned to the Honorable Thomas D. Lambros under the random assignment system which is the standard operating procedure in this District. L. Civ. R. 7.07. Judge Lambros transferred the petition to this Court as a "related matter", pursuant to Local Civil Rule 7.09(3).

Rule 7.09(3) provides that:

Subsequent proceedings in civil cases and in criminal cases (including petitions under 28 U.S.C. Section 2255) shall be assigned to the judge who heard the original case.

I.

In October of 1983, the State of Israel requested the extradition of John Demjanjuk from the United States to stand trial in Israel for murder and other offenses alleged under the Nazis and Nazi Collaborators (Punishment) Law, sections 1-4, pursuant to an Arrest Warrant, issued by Judge A.M. Simcha of the Magistrates Court, Jerusalem, Israel on October 18, 1983. The request was based upon the Convention on Extradition between the Government of the United States of America and the Government of the State of Israel. T.I.A.S. 5476, 14 U.S.T. 1717 (entered into force December 5, 1963) [hereinafter the "Treaty"]. Acting on behalf of Israel, the United States government filed a Complaint in the Northern District of Ohio seeking the extradition of John Demjanjuk to Israel, on November 18, 1983. The extradition matter was assigned to this Court, as a matter related to the denaturalization proceedings against John Demjanjuk over which this Court presided. *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd* 680 F.2d 32 (6th Cir. 1982) *cert. denied*, 459 U.S. 1036 (1982), pursuant to Local Civil Rule 7.09(4)(c) (N.D. Ohio).[2]

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2. This extradition case originally was assigned to this judge consistent with standard district court procedure, as stated in the Local C vil Rules of this district. At the time the government filed its Complaint, this Court had Demjanjuk's First Motion to Vacate Judgment in the denaturalization proceeding under advisement. Local Civil Rule (N.D. Ohio) 7.09(4)(c) (Assignment of Cases other than by Lot) provides, in relevant part:

> (4) Cases related to cases already assigned to a judge shall be assigned or transferred to said judge. Related cases are defined as follows:
>
> * * *
>
> (c) Civil cases are deemed related when a filed case (i) relates to property involved in an earlier numbered pending suit, (ii) *involves the same issue or issues of fact or*

(Continued on following page)

After the Court received extensive briefing by both the parties and the *amicus curiae,* the International Human Rights Group, the extradition hearing required by 18 U.S.C. § 3184 was held in two parts. On December 17, 1984, the question of whether a United States civilian court has subject matter jurisdiction in an extradition proceeding where the crimes alleged occurred during wartime, as well as several preliminary issues, was addressed. *Matter of Demjanjuk,* 603 F. Supp. 1463, 1465 (N.D. Ohio 1984). On February 21, 1985, this Court found that it did have subject matter jurisdiction to hear and decide the extradition matter. *Matter of Demjanjuk,* 603 F. Supp. 1468, 1469 (N.D. Ohio 1985). On March 12, 1985, the hearing on all other issues was held.

On April 15, 1985, this Court issued an opinion which addresses the numerous issues of facts and law presented by the extradition request and certifies to the Secretary of State that John Demjanjuk is extraditable to the State of Israel. The certification states that the John Demjanjuk brought before the Court is the one named in the Israeli Extradition Request and that competent and sufficient evidence has been presented to sustain charges of "murder", which are extraditable offenses pursuant to the Treaty. Order of April 15, 1985 at 51-52.

Petitioner John Demjanjuk argues that he is unlawfully imprisoned because the extradition court has acted

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Footnote continued—

grows out of the same transaction or subject matter as a pending civil suit, . . . (emphasis added.)

Since the extradition case involves some of the same parties and arose out of some of the same events as the denaturalization proceedings, it was assigned to this judge.

In November of 1983, Demjanjuk's First Motion to Vacate was denied. *United States v. Demjanjuk,* 103 F.R.D. 1 (N.D. Ohio 1983).

"in violation of the Constitution, laws and treaties of the United States". Petition for a Writ of Habeas Corpus by a Prisoner in Federal Custody at 2 (filed April 25, 1985) [Hereinafter "Habeas Petition"]. Petitioner argues that: jurisdiction over the extradition proceedings was taken contrary to the Constitution and, thus, the evidence of identity and probable cause was improperly before the Court, Habeas Petition at ii-iii, "the crime of genocide . . . is outside the terms of the Treaty", *id.* at iii, and petitioner is not properly charged, as required by 18 U.S.C. § 3184, *id.* at iii.

II. RECUSAL

Petitioner John Demjanjuk's attorneys have orally requested that this Court recuse itself from hearing the petition for writ of habeas corpus. They argue that it would be improper or inappropriate for this Court to, in effect, review itself by examining the validity of the April 15, 1985 certification of extraditability. In addition, they contend that there would be an appearance of bias and impropriety for this Court to rule on the petition for writ of habeas corpus. Presumably, they base their argument on 28 U.S.C. § 455(a) which provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Petitioner's request is denied.

First, petitioner's argument has been expressly rejected by at least one circuit court in the context of a petition for a writ of habeas corpus attacking extradition proceedings. In *David v. Attorney General of United States*, 699 F.2d 411 (7th Cir. 1983), David appealed the district court's denial of his petition for writ of habeas

corpus. Judge Foreman, of the Eastern District of Illinois, had certified David as extraditable under the French-American Extradition Treaty on charges of willful homicide and attempted willful homicide. Subsequently, Judge Foreman denied David's habeas petition. In affirming the the district court's denial of the writ of habeas corpus, the Seventh Circuit found, *inter alia,* that Judge Foreman had not violated 28 U.S.C. §455(a) by considering the habeas petition. The Seventh Circuit stated that a judge is not required to recuse himself from hearing a habeas petition which attacks an extradition hearing over which he presided. The Seventh Circuit found support for its decision in the procedures employed in actions brought under 28 U.S.C. § 2255[3] and in cases where a district judge is reversed, or has an order vacated, and the case is remanded to the judge for further proceedings. *Id.* at 416.

Second, while this case involves a petition brought pursuant to 28 U.S.C. § 2241 and the Rules Governing § 2255 Proceedings for United States District Court do not govern, Rule 4(a) of the § 2255 Rules and judicial precedent in cases involving § 2255 petitions for habeas corpus provide persuasive evidence that there is no impropriety in this Court's accepting jurisdiction in this case. Rule 4(a) provides:

> Reference to judge; dismissal or order to answer.
>
> The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the

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3. *See infra* at 5-6 [A28-A29].

> motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.

There are numerous cases where a trial judge in a criminal matter has decided a § 2255 proceeding in accordance with Rule 4 and has had his refusal to recuse himself upheld. *Accord, e.g., Burris v. United States,* 430 F.2d 399 (7th Cir. 1970), *cert. denied,* 401 U.S. 921 (1970); *Lucero v. United States,* 425 F.2d 173 (9th Cir. 1970); *Dukes v. United States,* 407 F.2d 863 (9th Cir. 1969); *Briscoe v. United States,* 129 U.S. App. D.C. 146, 391 F.2d 984 (1968); *Mirra v. United States,* 379 F.2d 782 (2nd Cir. 1967), *cert. denied,* 389 U.S. 1022; *United States v. Smith,* 337 F.2d 49 (4th Cir. 1964), *cert. denied,* 381 U.S. 916, *Simmons v. United States,* 302 F.2d 71 (3d Cir. 1962); *Martin v. United States,* 273 F.2d 775, 777 (10th Cir. 1960), *cert. denied,* 365 U.S. 853 (1961); *Carvell v. United States,* 173 F.2d 348 (4th Cir. 1949); *see also Machibroda v. United States,* 368 U.S. 487 (1962). *But see Halliday v. United States,* 380 F.2d 270 (1st Cir. 1967). These courts have reasoned that the trial judge's familiarity with the facts and circumstances surrounding the original trial makes it desirable for him to deal with the § 2255 petitions. *Burris,* 430 F.2d at 402.

Section 2255 was inserted in the judicial code to avoid the unseemly practice of having attacks upon the regularity of trials made before a coordinate judge. *Carvell,* 173 F.2d at 348; *Smith,* 337 F.2d at 52 (quoting Parker, "Limiting the Abuse of Habeas Corpus", 8 F.R.D. 171, 172-73 (1949)). Section 2255 was designed to eliminate the intolerable situation in which another district judge would consider evidence outside the original trial record and be forced to weigh the testimony of the original trial

judge against the word of a convicted felon.[4] *United States v. Edwards,* 152 F. Supp. 179, 182 (D.D.C. 1957).

Such factors are equally applicable in § 2241 habeas corpus proceedings initiated to attack a certificate of extraditability. This Court is familiar with the facts and circumstances surrounding the consideration of Israel's extradition request and related judicial proceedings. The likelihood of being misled by false allegations as to what occurred is slight. Furthermore, if this Court determines the merit of Demjanjuk's habeas petition, this District will avoid the unseemly spectacle of one district judge weighing the determination of a fellow district court judge against legal arguments and factual allegations made by an alleged felon.

Third, the Local Civil Rules for the Northern District of Ohio provide that cases "related" to cases already assigned to a judge should be assigned to that judge. Local Civil Rule 7.09. Judge Thomas Lambros determined that Demjanjuk's habeas petition is related to Case No. 83-Misc. 349 (the extradition proceeding) and thus, that Local Rule 7.09(3) "mandates the assignment of this action to the judge who heard the original case." Order of April 25, 1985. Pursuant to the Local Rules of this District, the habeas petition is properly before this Court.

It is appropriate and reasonable for this Court to decide the habeas petition, in part because expeditious action is possible because of the Court's prior experience in this matter. *See Matter of Demjanjuk,* 584 F. Supp. 1321 (N.D. Ohio 1984) (motion for recusal in extradition

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4. Prior to the adoption of § 2255, since evidence outside of the record was heard at the habeas corpus petition hearing, the trial judge at times became a witness, by deposition or otherwise, at that hearing.

proceedings denied; "with nothing more, this Court's rulings or action in previous related cases will not support a motion for recusal."). It is in the interests of justice and friendly foreign relations to complete judicial examination of this extradition matter seasonably. With the filing of this Order, the matter will now be ripe for review by the Sixth Circuit Court of Appeals. 28 U.S.C. § 2253.

III. WRITS OF HABEAS CORPUS IN EXTRADITION CASES

The decision of a judge or magistrate in an extradition case is not itself appealable. *Collins v. Miller,* 252 U.S. 364 (1920); *Shapiro v. Ferrandina,* 478 F.2d 804, 901 (2d Cir. 1973); *Jimenez v. Aristeguieta,* 290 F.2d 105 (5th Cir. 1961). Rather, the alleged felon may only attack the extraditability decision collaterally, through a writ of habeas corpus. *Fernandez v. Phillips,* 268 U.S. 310 (1924); *Shapiro,* 478 F.2d at 901.

An extradition proceeding is in the nature of a preliminary hearing, *Merino v. United States Marshal,* 326 F.2d 5, 12 (C.D. Cal. 1963); the government need only establish that competent and adequate evidence shows that the accused has committed the offenses charged pursuant to Treaty, 18 U.S.C. § 3184. It is not the purpose of an extradition hearing to determine the accused's guilt. *Collins v. Loisel,* 259 U.S. 309, 316 (1922). Rather, after the alleged felon has a hearing, where he is given the opportunity to establish why he is nonextraditable in the requested country, he still can have his day in court, when he can prove his innocence in a trial in the courts of the requesting country. Habeas corpus proceedings cannot take the place of a direct appeal, *Fernandez,* 478 F.2d

at 312, and are not a means for rehearing what the § 3184 judge has already decided, *id.*

Thus, the scope of review of an extradition decision through habeas corpus proceedings is very limited.

> Habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offence charged is within the treaty and, by a somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.

Fernandez, 268 U.S. at 312; *Accord, Charlton v. Kelly,* 229 U.S. 447 (1913); *Grin v. Shine,* 187 U.S. 180 (1902); *Prushinowski v. Samples,* 734 F.2d 1016, 1018 (4th Cir. 1984); *Shapiro,* 478 F.2d at 901; *Jiminez v. Aristeguieta,* 311 F.2d 547, 555 (5th Cir. 1962).

IV. NO ORDER TO SHOW CAUSE NECESSARY

Title 18 U.S.C. § 2243 provides that a court entertaining an application for a writ of habeas corpus

> shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

Under this provision, a district court has a duty to screen out a habeas petition which should be dismissed for lack of merit on its face. *Allen v. Perini,* 424 F.2d 134, 141 (6th Cir. 1970). *Accord, Aubut v. State of Maine,* 431 F.2d 688, 689 (1st Cir. 1970) (a habeas petition "should set out substantive facts that will enable the court to see a real possibility of constitutional error".)

In the instant case, it appears from the application for a writ of habeas corpus that John Demjanjuk is not entitled thereto. When the application is considered in conjunction with the motions, the files and the records in the extradition case and the Order of April 15, 1985, it appears conclusively that Demjanjuk is entitled to no relief. Thus, there is no need for consideration of a return on the writ. 18 U.S.C. § 2243. In this case, the allegations do not involve factual matters outside the extradition proceedings' records or beyond the knowledge of this Court. Requiring a return from the Government would not contribute to the resolution of issues or the achievement of justice. *Accord Allen*, 424 F.2d at 142.

V. HABEAS PETITION DENIED

As will be shown below, the issues raised by Demjanjuk's habeas petition have been considered in depth and ruled on by this Court during the extradition proceedings. *Matter of Demjanjuk*, 603 F. Supp. at 1469, 1473-79 (subject matter jurisdiction); Order of April 15, 1985 at 18-27 (Israel's assertion of jurisdiction in conformity with United States jurisdictional principles and international law), 28-35 ("murder" charges within the Treaty), 3-17 (identification) and 35-41 ("competent and adequate evidence" or "probable cause" to believe respondent committed the acts charged). Petitioner Demjanjuk has presented no new arguments or information that would cause this Court to reconsider its findings and legal conclusions.

First, petitioner again asserts that this Court lacked jurisdiction in the *extradition* proceedings because the crimes alleged are "war crimes" and occurred outside of the territorial jurisdiction of Israel. Habeas Petition at 3-6, 8-9, 9-10. Petitioner attempts to distinguish away

the precedent and legal reasoning used by this Court in finding that it had jurisdiction to determine whether petitioner is *extraditable*. Again, petitioner's arguments are misplaced. Indeed, the Court is disturbed that petitioner blatantly misconstrues this Court's prior opinions. Petitioner states that "the Genocide Convention cannot confer subject matter jurisdiction over the petitioner." *Habeas Petition* at 9. Of course, petitioner is correct. But the contention is irrelevant—the Court does not rely on the Convention in determining that it has subject matter jurisdiction over the extradition proceedings. This Court has already fully explored all of petitioner's arguments pertaining to subject matter jurisdiction. *Matter of Demjanjuk,* 603 F. Supp. 1468, 1469 (N.D. Ohio 1985); 603 F. Supp. 1473-1479 (N.D. Ohio 1985). Nothing has been presented to change the earlier decisions.

Second, petitioner argues that the Court changed the terms of the Treaty by finding him extraditable for "genocide". Habeas Petition at iii, 7-8. He states that

> By asserting acceptance of Universal jurisdiction over the Murder of Jews, the extradition court supplied terms to the United States-Israel Extradition Treaty, in plain contravention of its governmental role, *Cherokee Tobacco, supra, Ambiable Isabella, supra.* By doing so, it unlawfully supplied a *casus omissus* in the treaty.

This Court did not fill a gap in the Treaty and did not find petitioner extraditable for genocide. Indeed, the Court specifically found petitioner extraditable only for multiple charges of "murder", crimes for which petitioner is charged under the Israeli statute. Order of April 15, 1985 at 29-35. The Court found that Demjanjuk is charged with murder, pursuant to sections 1(b) and 2(f) of the Israeli statute, that these charges are recognized as crimes

under Article II of the Treaty, *id.* at 30 and that, pursuant to Article III, petitioner is legally extraditable to Israel. *Id.* at 32. Petitioner's argument fails.

Third, petitioner contends that "no evidence was presented to the extradition court that petitioner was Ivan Grozny". A habeas court cannot find for the petitioner because of lack of probable cause if *any* evidence as to probable cause exists. The issue of identifying the accused felon is not even properly before a habeas court. *Supra* at 7. In light of the numerous, detailed eyewitness accounts which identify John Demjanjuk as a Treblinka guard and set forth with great particularity descriptions of multiple murders he is alleged to have committed, Order of April 15, 1985, at 4-17, 35-41, petitioner's claim that "petitioner's connection with the identity or the genocidal crimes of Ivan Grozny was . . . never demonstrated by even a scintilla of evidence", Habeas Petition at 9, is frivolous and offensive.

Lastly, petitioner merely asserts, without any substantiation, that the document on which basis petitioner is sought does not charge him, as required by 18 U.S.C. 3184, *id.* at iii, and claims that the documents contained within the Israeli Extradition Request are not properly certified, *id.* at 2. The finding that petitioner was properly "charged" by Israeli authorities with extraditable offenses within the meaning of the treaty is not reviewable on habeas corpus. *Matter of Assarsson,* 687 F.2d 1157, 1160 (8th Cir. 1982); *Matter of Assarsson,* 635 F.2d 1237, 1240-42 (7th Cir. 1980). Were this habeas court to look at the merits of petitioner's argument, however, the Israeli Extradition Request does contain both a Request to Issue Warrant of Arrest, presented to the Magistrate Court in Jerusalem (Octobe[illegible], 1983) and a Warrant of Arrest, issued by Judge A.[illegible] Simcha of the Magistrate Court

(October 18, 1983) which set forth the charges against Demjanjuk. Pursuant to 18 U.S.C. § 3184 and the Treaty, this is sufficient. The Treaty does not include as a prerequisite to extradition the filing of formal charges and an extradition court need not find that an accused felon is charged in the same manner as would be required by United States criminal law nor need it review compliance with foreign criminal procedure. *Accord Assarsson,* 635 F.2d at 1242, 1244; *see also Grin,* 187 U.S. at 190-94.

Petitioner presents no argument or evidence to substantiate his claim that the certification of documents is improper, nor did he do so at the March 12, 1985 Extradition Hearing. *See* Transcript of March 12, 1985 Hearing at 111-25, 126-29, 164-166. Furthermore, questions of certification and authentication are not properly before a habeas court. Were this Court to examine the question again, however, it would still find the documents properly certified and authenticated. Order of April 15, 1985 at 4.

CONCLUSION

Petitioner has in no way met his burden of showing that he is in custody in violation of the "Constitution or laws or treaties of the United States." 18 U.S.C. § 2241(c)(3). *Accord Allen v. Perini,* 424 F.2d 134, 138 (6th Cir. 1970).

The application for writ of habeas corpus is hereby denied.

The effect of certification of extraditability is stayed until June 4, 1985 at 10:00 a.m. D.S.T. to afford the parties the opportunity to apply for whatever relief they deem appropriate.

IT IS SO ORDERED.

/s/ FRANK J. BATTISTI
Chief Judge

JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT

(Filed May 17, 1985)

No. C85-1226

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN DEMJANJUK,
Petitioner,

vs.

JOSEPH PETROVSKY, Warden, *et al.*,
Respondents.

JUDGMENT ENTRY

BATTISTI, *C.J.*

In accordance with the Memorandum Opinion filed on May 17, 1985,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that petitioner's application for a writ of habeas corpus is denied.

IT IS FURTHER ORDERED that the effect of certification of extraditability is stayed until June 4, 1985 at 10:00 a.m. D.S.T. to afford the parties the opportunity to apply for whatever relief they deem appropriate.

/s/ FRANK J. BATTISTI
Chief Judge

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed April 15, 1985)

Misc. No. 83-349

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF THE
EXTRADITION OF
JOHN DEMJANJUK
aka JOHN IVAN DEMJANJUK,
aka JOHN IVAN DEMYANYUK.

MEMORANDUM OPINION AND ORDER

BATTISTI, *C.J.*

On October 31, 1983, the Government of the State of Israel requested the extradition of John Demjanjuk [hereinafter referred to as "respondent" or "the respondent"] from the United States of America pursuant to an Israeli arrest warrant issued on October 18, 1983. The warrant charges Demjanjuk with "the crimes of murdering Jews, [which are] offenses under sections 1 to 4 of the Nazi and Nazi Collaborators (Punishment) Law" of the State of Israel. State of Israel's Request for the Extradition of John Demjanjuk at 11-12.

The Government of the United States pursuant to its obligation under the Convention on Extradition between the Government of the United States of America and the

Government of the State of Israel, T.I.A.S. 5476, 14 U.S.T. 1717 (signed December 10, 1962) (entered into force December 5, 1963) [hereinafter "the Treaty"], filed on November 18, 1983 a complaint [hereinafter the "Government's Complaint"] seeking the extradition of the respondent to Israel. In its Complaint, the Government states that respondent is charged with "the crimes of murder and malicious wounding; inflicting grievous bodily harm" which are among the enumerated offenses in Article II of the Treaty, which is still in full force and effect. Government's Complaint at 1-2.

This Court must determine whether respondent can be extradited to the State of Israel pursuant to 18 U.S.C. § 3184.[1]

I.

PRIOR HISTORY

The respondent, a native of the Ukraine of the Union of Soviet Socialist Republics [hereinafter referred to as "U.S.S.R."], entered the United States on February 9, 1952; he was granted lawful permanent residence under the Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, 62 Stat. 1009, as amended. On November 14, 1958, he was naturalized as a United States citizen by the United States District Court in Cleveland, Ohio. At his naturalization, he changed his first name from Ivan to John. He subsequently took up residence in Seven Hills, Ohio.

On June 23, 1981, this Court found that respondent had made material misrepresentations in his visa applica-

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1. Throughout this opinion, the Court will use the words "extraditability" and "extradition." It will be clear from the context of the passage whether the reference is to the Court's legal determination under Treaty and statute (extraditability) or the Executive's discretionary decision (the actual extradition).

tion by failing to disclose his service for the German SS at the Trawniki and Treblinka prison camps in 1942-43. It was ordered that respondent's United States citizenship be revoked and his certificate of naturalization cancelled. *United States v. Demjanjuk,* 518 F.Supp. 1362 (N. D. Ohio, 1981), *aff'd,* 680 F.2d 32 (6th Cir.), *cert. denied,* 459 U.S. 1036 (1982).

On December 6, 1982, the Immigration and Naturalization Service began deportation proceedings against respondent. On May 23, 1984, Immigration Judge Adolph F. Angellili found respondent deportable and designated the U.S.S.R. as the country of deportation. However, the immigration judge also granted the respondent the option of voluntary departure from the United States. On February 14, 1985, the Board of Immigration Appeals dismissed respondent's appeal of the deportation order; the Board affirmed the finding of respondent's deportability and reversed the grant of voluntary departure. *In re John Demjanjuk,* I & N Dec., File A8-237-417 (Cleveland) (B.I.A. February 14, 1985) [hereinafter "B.I.A. Decision"].

On July 17, 1984, this Court ruled that, despite respondent's appeal of his deportation, the extradition and deportation proceedings are independent and, as a result, respondent's extradition hearing could proceed. The Court also stated that the United States Government was under no obligation to elect deportation or extradition as the exclusive means of proceeding against respondent.

II.

On March 12, 1985, an extradition hearing for respondent was held. Oral argument was heard and documentary evidence including photographs, affidavits, and prior recorded testimony was presented. No witnesses were called to testify that day in open court.

The issues or conditions necessary for a finding of extraditabliity have been previously identified. *See* Order of March 5, 1985 at 2. The Court has already determined that jurisdiction is present and that the United States-Israel extradition treaty remains in full force and effect. Order of December 6, 1984; Order of March 8, 1985. Three issues were considered at the March 12, 1985 extradition hearing. They are:

1. Whether the respondent is the party named in the complaint [issue of identification];

2. Whether the crimes for which respondent's extradition is sought are offenses "within the treaty" [issues of treaty interpretation]; and

3. Whether there is "competent and adequate evidence" or "probable cause" to believe respondent committed the acts with which he is charged [issue of probable cause].

Each of these issues will be examined and resolved below.

III.

IDENTIFICATION

The Court must determine whether respondent John Demjanjuk is the individual named in the complaint. Normally, this inquiry would be simplified by a facial comparison of the respondent's name and that appearing in the complaint. However, in the instant case, respondent alleges that he is not the man whom Israel seeks; in other words, he claims that the person sought and the respondent are *two different* people.

For the following reasons, the Court finds that there is probable cause to believe respondent is the individual

who is charged with the crimes alleged by the State of Israel.

The Government submitted four exhibits. They are:

a set of documents, filed November 18, 1983, entitled "State of Israel/Ministry of Justice/Request for the Extradition of John Demjanjuk" [previously cited as "Israeli Extradition Request"] [Government Exhibit 1];

a set of documents, filed January 30, 1984, entitled "State of Israel/Supplement to the Request for the Extradition of John Demjanjuk" [Government Exhibit 2];

a set of documents, filed March 2, 1984, entitled "State of Israel/Additional Supplement to the Request for the Extradition of John Demjanjuk" [Government Exhibit 3];

a document filed November 18, 1983, entitled "Declaration of Jeffrey H. Smith [Assistant Legal Adviser, United States Department of State]" [Government Exhibit 4].

Government Exhibits 1-3 are all certified as "authenticated documentary evidence" by James F. Hughes III, Consul General of the United States of America at Tel Aviv, Israel. Counsel General Hughes certified and placed the seal of his office on Government Exhibit 1 on November 3, 1983. Government Exhibits 2 and 3 were similarly certified by Hughes on January 12, 1984 and February 9, 1984 respectively. Government Exhibit 4 is certified with the seal of United States Department of State by Secretary of State George Schultz through Acting Authentication Officer Joan C. Hampton; it was sealed November 17, 1983.

Respondent has not questioned the certification and authenticity of the evidence against him submitted by the Government in this extradition matter. At the March 12, 1985 extradition hearing, the Court identified the proper standard for the admission of evidence in an extradition proceeding. Transcript of March 12, 1985 Hearing, at 111-112. [hereinafter "March Tr."] Documentary evidence which has been authenticated in the statutory manner and then certified by an appropriate United States diplomatic or consular official must be admitted in an extradition proceeding. 18 U.S.C. § 3190. Since the admission of properly certified evidence is obligatory on the extradition court under 18 U.S.C. § 3190, the Court instructed the respondent that evidentiary challenges "may only question whether the certification or authentication complies with the statute." March Tr. at 112. The Court repeatedly asked counsel for respondent to state for the record his specific objections to the evidence. March Tr. at 113, 118, 120, 121, 123, 124, 125, 127, 129, 134-35, 164. Counsel for respondent repeatedly "reserved his objections," see March Tr. at 114, 120, 134-35. However, when the Court specifically asked counsel to put on the record any remaining objections he had to the evidence, respondent's counsel stated he "ha[d] nothing more." March Tr. at 165. The Court viewed the documents and respondent's "objections," none of which directly contested the certification or authentication of the evidence submitted. Citing both 18 U.S.C. §3190 and Article X of the U.S.-Israel extradition treaty, the Court found the documents properly certified and authenticated and admitted the four exhibits into evidence. March Tr. at 165-66.

The Government need only make out a prima facie case to establish identification. *Argento v. Jacobs*, 176 F.Supp. 877, 879 (N.D. Ohio, 1959) (Weick, J.). Nu-

merous cases establish that identification in an extradition proceeding requires only a threshhold showing of probable cause. In *Raftery ex rel. Fong v. Bligh* 55 F.2d 189 (1st Cir. 1932), the First Circuit reviewed a habeas corpus decision to determine whether the district court had correctly identified the individual who was to be extradited for murder. The court found that there was competent evidence on the record, *id.* at 195, and that the affidavits identifying the requested individual were properly certified and authenticated. *Id.* at 193.[2]

In *Hooker v. Klein*, 573 F.2d 1360, 1367 (9th Cir. 1978), the Court stated that "[t]he extraditing court also has the duty to determine whether the party brought before it is the one named in the *complaint.*" (emphasis added) However, rather than merely examining the complaint, that is, the document filed by the United States Government, the Court must review the arrest warrant or charging document filed by the requesting government. Indeed, the *Hooker* opinion does make such a review: "The record of the extradition proceeding also reveals that there was competent legal evidence before the extradition judge upon which he could find that the person

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2. In *Raftery*, an interstate extradition case, the Court stated that the extraditing official, in that case the Governor of Massachusetts, did not need to consider whether the person arrested (i.e. the person responding to the extradition) is identical to the person demanded. *Id.* at 193. The Court stated that the burden of proving that the person arrested is a fugitive from justice is upon the state, "there being no presumption that the person arrested is the person demanded." Although *Raftery* was a habeas corpus proceeding, the inference for the instant case is that the extraditing magistrate in the first instance need not determine absolutely that the person demanded and the one arrested are the same. The Government, however, still has the burden of proving some nexus between the two, namely probable cause to believe the two are the same. However, once the extradition warrant is issued, the *Raftery* court noted it must be regarded as "presumptively right," the burden of overcoming the presumption being on petitioner (relator). *Id.* at 193.

before him was the one named in the *extradition warrant* . . ." (emphasis added). *Id.* at 1369. The proposition that the extradition warrant is the document to focus upon finds further support in *Fernandez v. Phillips*, 268 U.S. 311, 313 (1925): "The *warrant* is said to be bad because it names Mariano Viamonte, and not Mariano Viamonte Fernandez, the appellant. He is named both ways in the proceedings and is identified by testimony. There is nothing in this objection. . . ." (emphasis added). A similar passage appears in *Charlton v. Kelly*, 229 U.S. 447, 448-49 (1912): "The proceedings for the extradition of the appellant were begun upon a *complaint* duly made by the Italian Vice-Consul, [the submission from the requesting government] charging him with the commission of a murder in Italy. . . . At the hearing, evidence was produced which satisfied Judge Blair that the appellant was a fugitive from justice and that he was the person whose return to Italy was desired. . . ."

Examining the Government's Complaint in the instant case proves nothing. The United States seeks "one John Demjanjuk, who currently resides at 847 Meadow Lane, Seven Hills, Ohio." There is no question that respondent lives at this address in Seven Hills. However, the Israeli Extradition Request states the following:

A - Description of Person Whose Extradition is Requested

2. Demjanjuk's personal particulars and description are as follows:

Family name:	Demjanjuk
First Name:	John
Also known as:	Iwan Demjanjuk Ivan Demjanjuk "Ivan Grozny" ("Ivan the Terrible")
Father's Name:	Mikola or Nikola
Date of Birth:	April 3, 1920
Place of Birth:	Dub Nacharenzi, Ukraine, a republic of the U.S.S.R.
Last known residence:	847 Meadow Lane, Seven Hills, Ohio

Israeli Extradition Request at 1.

Respondent contends that he is not the Ivan Grozny sought by Israel. Transcript, Hearing of Dec. 17, 1984, at 55 [hereinafter "December Tr."].[3]

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3. The Government of Israel states the following in its request under "Identification of Demjanjuk":

> A. A Photograph of Demjanjuk is attached hereto and marked Exhibit "A". This photograph has been identified by witnesses, whose statements are included in this Request for Extradition, as a picture of the person known to them as "Ivan" or "Iwan" or "Ivan the Terrible" from the Treblinka death camp (See Exhibits C, D, E, and F).
>
> B. For further identification of Demjanjuk as the person requested by this Request for Extradition, reference is hereby made:
>
> 1. To his identification from pictures by witnesses who testified at the trial of the case of United States of America vs. John Demjanjuk, File No. C77-923, 518 F. Supp. 1362 (1981) (an action to cancel Demjanjuk's U.S. citizenship);
>
> 2. To the findings by the Court in that case concerning the eyewitness identification of Demjanjuk as the 'Ivan' from Treblinka.
>
> See Memorandum of Decision and Order of the Court which is attached hereto and marked Exhibit B.

Israeli Extradition Request at 1-2.

In the hearing on this matter held December 17, 1984, the United States Government was asked "What evidence is relied upon by the State of Israel to establish that the requested individual is indeed, the respondent?" December Tr. at 50. Counsel for the Government responded:

> [T]here is no question in the Government's mind that the identification information that is separate and apart from the denaturalization findings of fact which are incorporated are abundantly clear and meet the standards [of identification] in and of themselves. . . .
>
> The Government submits that the witness affidavits over and apart from those that are incorporated via the denaturalization case are sufficient."

December Tr. at 54-55.

Although the Government did not directly state on what evidence it was relying, *see* December Tr. at 54, and did state that Israel had incorporated the denaturalization findings as part of its Extradition Request, *id.*, the thrust of its statement is that the eyewitness identifications are independent from the denaturalization identification and sufficient in themselves to establish that respondent is the individual sought in this extradition request.

It is well-established that sworn statements of witnesses and photographs may be used to identify individuals sought for extradition. *Argento v. Horn*, 241 F.2d 258, 263 (6th Cir. 1957) (Stewart, J.); *In re Edmondson*, 352 F. Supp. 22 (D. Minn. 1972) (Counsel General of U.S. in Ottawa submits certified affidavit and "certified photographs of the two respondents which this court personally compared with the individuals as they appeared in court at the extradition hearing"); *Ex part Romano*, 40 F.2d 750 (S.D. Calif. 1930) (a photograph identified as that

of the murderer by two witnesses residing at Bivona, where the crime was committed, was attached to the depositions and introduced in evidence at the hearing: evidence was sufficient to establish identity); *Bagley v. Starwich*, 8 F.2d 42, 42 (9th Cir. 1925) ("a photograph of one of the robbers, authenticated by two witnesses, is attached as an exhibit to these depositions, and it appears that this is a photograph of appellant. This was a proper method in which to prove the identity of appellant with the robber.").

Having determined that the Government need only make out a prima facie case and that affidavits may be used to identify an individual sought for extradition, the Court will consider the affidavits submitted by the Government to determine if they meet the probable cause standard for identification.

The first eyewitness affidavit, marked as "Exhibit C" in the Israeli Extradition Request (Government Exhibit 1), is a "Statement under Oath" made by Elijahu Rosenberg, delivered before the Magistrate Court of Tel Aviv. The statement, which is translated from the Hebrew, is certified by Judge David Steinmetz of the Magistrate Court of Tel Aviv as having been made by Rosenberg on October 24, 1983. In the statement, Rosenberg confirms that he testified on February 18 and 19, 1981 in respondent's denaturalization trial and that the documents attached to the Israel extradition request are all accurate transcriptions of his testimony. In item #5 of the statement, Rosenberg states: "There has been shown to me a photograph marked with the letter 'A.'. This is a picture of the man known to me as Iwan from Treblinka. I identified this photograph at the above trial as set out on page 520 of the attached transcript."

The second affidavit, identified as "Exhibit D" in Government Exhibit 1, is a similar statement made by Pinhas Epstein, who testified in the denaturalization trial on February 20, 1981. On October 24, 1983, he stated under oath before Judge Steinmetz that the photograph marked with the letter 'A' was "the man known to me as Iwan from Treblinka." Sonia Lewkowicz in the third affidavit, which is identified as "Exhibit E" in Government Exhibit 1, also identified the photograph with the letter 'A' as a photograph of the "man known to me as Iwan from Treblinka." Her statement was made before Judge Steinmetz on October 24, 1983. Lewkowicz testified at the denaturalization trial on February 19, 1981.

Government Exhibit 1 also contains, as "Exhibit F", the "Statement under Oath" of Joseph Czarny, made before Judge Steinmetz on October 24, 1983. Czarny states that on September 21, 1976, he "made a statement in German to a police officer at the National Police Headquarters in Tel Aviv concerning Ivan Demjanjuk, known to me by the nickname "Ivan the Terrible" from the Treblinka camp during the years 1942-43." He states in item 3 that "There has been shown to me a photograph marked with the letter 'A' and I identify that as a picture of the man known to me as 'Ivan' from Treblinka."

In his statement to the police on September 21 1976, Czarny states that upon seeing three brown cardboard sheets with seventeen photos on them, he pointed to photo No. 16 "at first sight", saying:

> Why, this is Ivan Grozny, it is Ivan, the notorious Ivan. It is thirty-three years since then, but I recognise him at first sight with complete certainty. I believe I would recognise him even by night. He was very tall, of sturdy build, his face was not so full

and bloated then as it is in this picture. But it is the same facial structure, the same nose, the same eyes and forehead as he had. A mistake is out of the question."

Government Exhibit 1, "Exhibit F", statement at 1-2 (p. 2 of the German original).

The photograph marked letter 'A' which witnesses Rosenberg, Epstein, Lewkowicz, and Czarny all identified as the respondent is the photograph which appeared on John Demjanjuk's 1952 visa application to the United States. There is no question that this is indeed a picture of respondent or that it is authentic.

Government Exhibit 1 also includes as Exhibits "G" and "H" transcripts of the testimony of witnesses Chiel Rajchman and Georg Rajgrodzki in respondent's denaturalization trial. The Court notes that the witnesses did identify respondent as Ivan from Treblinka during the denaturalization trial.

Government Exhibit 2 consists of three affidavits. The first affidavit is that of Dr. Yitzhak Arad.[4] Based on his research, including the books and articles he has authored, Dr. Arad states "My research on the subject of the Treblinka death camp has also shown that during the period 1942-43, the gas chambers at Treblinka were operated by two Ukranians known to the prisoners and inmates of the camp as 'Ivan the Terrible' and his assistant, Nikolai." Dr. Arad's statement is certified as being made on December 22, 1983.

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4. Dr. Arad is a historian who received a doctorate in the History of the Holocaust from the University of Tel Aviv. Dr. Arad, at the time he gave his statement, was Chairman of the Directorate of the Yad Vashem Martyrs and Heroes Remembrance Authority in Jerusalem, which is a museum and archives covering the holocaust period from 1933 to 1945. By 1984, Dr. Arad had been Chairman of the Directorate for 12 years.

The second affidavit in Government Exhibit 2 is an affidavit by Elijahu Rosenberg. It is certified as being made on January 5, 1984. In the affidavit, Rosenberg states that at the denaturalization trial, he testified that he:

> had the opportunity to observe the persons who operated the motors which sent the poisonous gas fumes into the gas chambers, and that I saw that the persons who operated these motors were two Ukranians by the names of Iwan and Nikolai.
>
> I hereby confirm that at the said trial, I identified two photographs as being pictures of the man known to me as "Ivan" or "Ivan the Terrible" from the Treblinka death camp.

The third affidavit is that of Marvin E. Hankin, who is Senior Assistant to the Staff Attorney for the Israel Ministry of Justice. The affidavit is certified as being made on January 6, 1984. On page 3 of that affidavit, Hankin states:

> I hereby certify that the photograph attached hereto and marked 'A' is the identical photograph which was previously identified by the witnesses Elijahu Rosenberg, Pinhas Epstein, Sonia Lewkowicz and Joseph Czarny and which was attached as Exhibit A to Israel's Request of October 31, 1983 for the Extradition of John Damjanjuk.

Government Exhibit 3 contains two statements made under oath. Exhibit "ER" is a "Statement [made] under Oath" by Elijahu Rosenberg on February 5, 1984. In it Rosenberg states that:

> Today, the 5th of February 1984, Mr. Martin Kolar, of the Israel Police Unit for the Investigation of Nazi

> Crimes, produced to me the picture attached hereto and marked 'ER/1'. I hereby confirm that this is a picture of John (Ivan) Demjanjuk whom the State of Israel wishes to extradite and bring to trial for the deeds he committed in the years 1942 and 1943 at the Treblinka death camp. . . . In my evidence [testimony] in the [denaturalization] case, I referred to Demjanjuk by the name 'Iwan' because this is how he was known to me when I was imprisoned in the Treblinka camp.

Exhibit PE is a "statement [made] under Oath" by Pinhas Epstein on February 5, 1984. Epstein states:

> On the 5th of February 1984 Mr. Martin Kolar, of the Israel Police Unit for the investigation of Nazi Crimes, produced to me the picture attached hereto and marked "PE/1". I hereby confirm that this is a picture of John (Ivan) Demjanjuk whom the State of Israel wishes to extradite and bring to trial for the deeds he committed in the years 1942 and 1943 at the Treblinka death camp. . . . In my evidence [testimony] in the said case, I referred to Demjunjak by the name "Iwan" because this is how he was known to me when I was imprisoned in the Treblinka camp.

The photographs marked 'ER/1' and 'PE/1' are identical to one another. They are circa. 1982 photographs of John Demjanjuk.

The Court finds that there is sufficient evidence based on the eyewitness affidavits submitted by the Government to conclude that there is probable cause to believe respondent is the individual known as Ivan Demjanjuk sought by Israel and named in the arrest warrant. This Court need not identify a particular number or quantity of evidence to reach its determination. It is enough to say

that there is sufficient evidence on the record, based on the Rosenberg, Epstein, Lewkowicz, and Czarny affidavits, which is both authentic and relevant, to find that the Government has made a *prima facie* case that respondent John Demjanjuk is the man whose extradition is sought. As previously stated it is not an extradition court's function to determine with absolute certainty whether the individual sought actually committed the offenses.

The case of *In re Assarsson,* 635 F.2d 1237 (7th Cir. 1980), is instructive regarding identification. In that case, a Swedish citizen brought a habeas corpus action challenging his extradition to Sweden on charges of arson, fraud and attempted fraud. Assarsson did not contest that he was the person whose arrest was sought. *Id.* at 1246. The court specifically distinguished his case from those cases "where the identity of the person seized in the requested state was at issue." *See, e.g., Raftery ex rel. Fong v. Bligh,* 55 F.2d 189 (1st Cir. 1932), *supra,* at 6. However, in *Assarsson,* as in the instant case, the authentication of the documents was not an issue. *See supra* at 4-5. Assarsson's objection was to whether the evidence (since it lacked a photograph) was sufficient to identify him. The court stated:

> [i]t may be that on the full trial [the requested individual] may be able to submit substantial proof that another rather than he was the perpetrator of the fraud, but that is a matter for exploration during the trial in [the requesting country] and not for extensive evidentiary inquiry during the extradition hearing.

Assarsson, at 1245 (quoting from *Peroff v. Hylton,* 542 F.2d 1247, 1249 (4th Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977) (extradition request from Sweden)). Hence, as

Assarsson indicates, should respondent be tried in Israel, he can present exculpatory evidence that he was not the person who committed the crimes with which he is charged.

Respondent has attempted to call into question this identification by questioning the integrity of the earlier denaturalization proceeding against him. He specifically alleges fraud and misconduct on the part of the Government and this Court, claiming that the Trawniki I.D. bearing respondent's picture was "intentionally altered" by the Soviet Union and is "fraudulent." Respondent's Reply to Government's Pre-Hearing Memorandum (May 24, 1984) at 27-29. The Court will not, once again, reconsider these charges here, having done so numerous times before. *See* Order of February 12, 1985, *United States v. Demjanjuk,* Case No. 77-923 (second motion to vacate); *Matter of Demjanjuk,* 584 F. Supp. 1321 (N.D. Ohio 1984) (recusal motion); *United States v. Demjanjuk,* 103 F.R.D. 1 (N.D. Ohio 1983) (first motion to vacate). Respondent's charges have been found to be baseless. The denaturalization proceeding has been reviewed and affirmed on appeal. *See United States v. Demjanjuk,* 680 F.2d 32 (6th Cir.), *cert. denied,* 459 U.S. 1056 (1982); *see also* B.I.A. Decision, at 7-10.

Although respondent has continued to dispute the use of the Trawniki card despite numerous decisions refuting his position, there is sufficient evidence to identify respondent for extradition purposes without reference to the Trawniki card at all. The independence of the evidence was noted by the Board of Immigration Appeals.

> Moreover, contrary to respondent's allegations, the Trawniki card was not the sole evidence of the respondent's activities at Trawniki and Treblinka. The

> respondent's arguments conveniently ignore the fact that five surviving prisoners and a German guard identified the respondent's photograph as that of the Ivan who operated the gas chambers at Treblinka.

B.I.A. Decision, at 9-10.

Those eyewitness identifications remain sufficient to establish respondent's identity. The identifications were based on viewing a photograph marked "A". This photograph is the 1952 visa application photograph of John Demjanjuk. It is not the picture which appears on the Trawniki I.D. card. The subsequent identifications made by witnesses Rosenberg and Epstein in the supplementary motions were based on photographs marked "ER/1" and "PE/1." These are identical photographs. The photograph is a picture, circa 1982, of John Demjanjuk, standing in front of a height chart. Hence, the eyewitness identifications were based on photographs, the authenticity of which is not questioned. Respondent's efforts to call into question these identifications made on the basis of authenticated photographs simply because the identifications were made in the denaturalization proceedings cannot be countenanced. Not only have these denaturalization findings and proceedings been found to be proper but the fact that the identifications were made in open court and under oath serves to insure that the identifications were conducted properly.

Respondent's counsel argues that there is "absolutely no connection" between John Demjanjuk and Ivan Grozny, the guard at the Trawniki and Treblinka camps. Transcript of March 12, 1985 Hearing [hereinafter referred to as "March Tr."]. Respondent's counsel stated at the March 12th extradition hearing that the Government should proceed "on the basis of *some identification* that

shows this is the individual, and if it is, in fact, linked with 1942 and 1943, then there ought to be *some evidence* of probable cause as opposed to a mere allegation that he has been the man on trial for the last seven years or so." (emphasis added). March Tr. at 157, 158. The Court does not know what type of evidence respondent means when he says "some evidence."[5] Absolute certainty is not required in the law, whether it be for identification purposes or in meeting burdens of proof.

This Court finds that not only are the eyewitness identifications sufficient but there is an obvious and striking resemblance between the man depicted in the submitted photographs and the respondent, which when taken together clearly rise to the level of probable cause.

IV.

TREATY INTERPRETATION

Turning to the second element an extradition court must consider, this Court will decide whether respondent has been charged with having committed, within the jurisdiction of the State of Israel, any of the crimes provided for in the Treaty. 18 U.S.C. §3184.

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5. The Court is unaware of any evidence other than eyewitness affidavits and photographs which are available in the instant case. Surely, fingerprints, blood samples, dental records, voice recordings, etc. and other types of physical or scientific evidence are unlikely here, given the destruction of the camps and the passage of time. It is therefore noteworthy that respondent admits that he had a blood group tatoo inside his left arm which was later removed. An expert witness testified that only members of the German SS would be so marked. *Demjanjuk*, 518 F. Supp at 1377-78; BIA Decision, at 10. However, this evidence was adduced at the denaturalization hearing and has not been submitted as part of the Government's evidence in this extradition proceeding. The Court is therefore not relying on the tatoo in making its identification determination.

A. *Israeli Jurisdiction*

Respondent asserts that Israel lacks jurisdiction under "recognized principles of International Law" to bring him to trial. Respondent's Motion to Terminate at 11 (filed April 2, 1984). If Israel lacks jurisdiction,[6] the United States can not extradite respondent to Israel. Israel's assertion of jurisdiction over respondent, however, is proper under both Israeli municipal law and international law. Furthermore, Israeli jurisdiction does not violate United States jurisdictional principles or practices in any way.

In 1950, Israel enacted the Nazis and Nazi Collaborators (Punishment) Law, 5710-1950. [hereinafter "Nazi Statute"][7] This statute makes crimes against the Jewish people, crimes against humanity and acts constituting war crimes which occurred during the Nazi period, *inter alia*, punishable under Israeli law.[8] The statute defines these crimes as follows:

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6. Absent contrary Congressional intent, international law is part of the law of United States. *Accord The Paquete Habana*, 175 U.S. 677, 712 (1900); *Tag v. Rogers*, 267 F.2d 664 (D.C. Cir. 1959), *cert. denied*, 362 U.S. 904 (1959).

7. This statute was passed by the Israeli Knesset on the 18th Av, 5710 (1st August, 1950), and published in *Sefer Ha-Chukkim* No. 57 of the 26th Av, 5710 (9th August, 1950). p. 281. The Bill and an Explanatory Note were published in *Hatza'ot Chok* No. 36 of the 11th Adar, 5710 (28th February, 1950). p. 119.

8. Section 1(a) of the statute provides:

A person who has committed one of the following offences—

(1) done, during the period of the Nazi regime, in an enemy country an act constituting a crime against the Jewish people;

(2) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against humanity;

(3) done, during the period of the Second World War, in an enemy country, an act constituting a war crime, is liable to the death penalty.

Sections 2, 3 and 4 provide, in relevant part:

2. If a person, during the period of the Nazi regime, committed in an enemy country an act by which, had he com-

(Continued on following page)

1.(b) In this section –

"crime against the Jewish people" means any of the following acts, committed with intent to destroy the Jewish people in whole or in part:

1. killing Jews;
2. causing serious bodily or mental harm to Jews;
3. placing Jews in living conditions calculated to bring about their physical destruction;
4. imposing measures intended to prevent births among Jews;

Footnote continued—

mitted it in Israel territory, he would have become guilty of an offence under one of the following sections of the Criminal Code, and he committed the act against a persecuted person as a persecuted person he shall be guilty of an offence under this Law and be liable to the same punishment to which he would have been liable had he committed the act in Israel territory: . . .

(e) section 312 (manslaughter);

(f) section 214 (murder); . . .

(j) section 238 (grievous harm); . . .

3. (a) A person who, during the period of the Nazi regime, in an enemy country, was a member of, or held any post or exercised any function in, an enemy oraginsation is liable to imprisonment for a term not exceeding seven years. . . .

4. (a) A person who, during the period of the Nazi regime, in an enemy country and while exercising some function in a place of confinement on behalf of an enemy administration or of the person in charge of that place of confinement, committed in that place of confinement an act against a persecuted person by which, had he committed it is Israel territory, he would have become guilty of an offence under one of the following sections of the Criminal Code, shall be guilty of an offence under this Law and be liable to the same punishment to which he would have been liable had he committed the act in Israel territory: . . .

(3) section 241 (wounding and similar acts);

(4) section 242 (failure to supply necessaries);

(5) section 249 (common assault);

(6) section 250 (assault causing actual bodily harm);

(7) section 261 (unlawful compulsory labour); . . .

5. forcibly transferring Jewish children to another national or religious group;

6. destroying or descrating Jewish religious or cultural assets or values;

7. inciting to hatred of Jews;

"crime against humanity" means any of the following acts:

murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds;

"war crime" means any of the following acts:

murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas" killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity.

No argument has been advanced that the Israeli statute was not validly enacted under Israeli law. The Request to Issue Warrant of Arrest, presented to the Magistrate Court in Jerusalem (October 18, 1983) [hereinafter "Warrant Request-Exhibit J"] and the Warrant of Arrest, issued by Judge A. M. Simcha of the Magistrate Court (October 18, 1983) [hereinafter "Arrest Warrant-Exhibit J"] both included in the Israeli Extradition Request,[9] show

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9. The "Warrant Request-Exhibit J" and the "Arrest Warrant-Exhibit J" are two separate documents which are included in Government Exhibit 1, the Israeli Extradition Request. They are identified therein as Exhibit J.

that respondent is charged with offenses within the statute.[9a] Israeli courts have recognized their jurisdiction to bring to trial war criminals for extraterritorial crimes, pursuant to the Nazi statute. *Accord Attorney General of the Government of Israel v. Adolf Eichmann,* 36 I.L.R. 5 (Dist. Ct. Jerusalem, 1961) (*reprinted,* in relevant part, 56 *Am. J. Int'l L.* 805 (1962); *aff'd,* 36 I.L.R. 277 (1962). Thus, the assertion of jurisdiction over respondent is certainly proper under Israeli law.

International law does not generally prohibit the application of a state's laws (so-called "jurisdiction to prescribe") or the jurisdiction of its courts ("jurisdiction to enforce") over non-citizens or acts committed outside of its territory. *The Case of S.S. Lotus* (*France v. Turkey*), [1927] P.C.I.J. Ser. A, No. 10 at 19. Rather, states have a "wide measure of discretion which is only limited in certain cases by prohibitive rules." *Id.* In other cases, every state remains "free to adopt the jurisdictional principles which it regards as best and most suitable". *Id.* The exercise of extraterritorial criminal jurisdiction over non-citizens in certain circumstances does not violate a state's international obligations, such as the duty to respect the sovereignty of other states. *See id.* at 20. It need not be decided here whether international law permits all that it does not forbid. Israel's assertion of jurisdiction over respondent based on the Nazi statute conforms with the international law principles of "universal jurisdiction."

International law provides that certain offenses may be punished by any state because the offenders are "common enemies of all mankind and all nations have an equal interest in their apprehension and punishment". *United*

9a. See discussion *infra* at 29-30 [A71].

States v. Otto, Case No. 000-Mauthausen-5 (DJAWC, July 10, 1947) (citing *Wheaton's International Law* (6th Ed.), Vol. 1 at 269); *see also* Restatement of the Foreign Relations Law of the United States, Tentative Draft No. 2 (1981) § 404 [hereinafter "Restatement"]. Universal jurisdiction over certain offenses is established in international law through universal condemnation of the acts involved and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations. Restatement § 404, Comment (a). Piracy is the paradigm of an offense "against the common law of nations". *See United States v. Otto.* Other crimes which are universally condemned include participation in the slave trade and attacks on or hijacking of aircraft. Restatement § 404. *Accord* Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 22 U.S.T. 1641, T.I.A.S. 7192 (1971); Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 24 U.S.T. 564, T.I.A.S. 7570 (1973). The power to try and punish an offense against the common law of nations, such as the law and customs of war, stems from the sovereign character of each independent state not from the state's relationship to the perpetrator, victim or act. *United States v. Brust* at 6, Case No. 000-Mauthausen-7 (DJAWC, Sept. 19, 1947), *aff'd,* War Crimes Board of Review, Office of the Judge Advocate (Nov. 6, 1947).

The principle that the perpetrators of crimes against humanity and war crimes are subject to universal jurisdiction found acceptance in the aftermath of World War II. The wartime Allies prosecuted persons accused of war crimes and crimes against humanity in several

forums.[10] In a number of instances, they exercised extra-territorial jurisdiction over the accused. The International *Military Tribunal at Nuremberg* tried major war criminals "whose offences ha[d] no particular geographical location". *The Nurnberg Trial*, 6 F.R.D. 69, 76 (1946); Agreement by the Government of the United States of America, the Provisional Gove[illegible] of the French Republic, the Government of the U[illegible] Kingdom of Great Britain and North Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement) arts. 4, 6, 59 Stat. 1544, E.A.S. No. 472 (August 8, 1945). Numerous individual defendants were convicted of "war crimes" and "crimes against humanity",[11] many of

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10. The Court is aware that a great body of historical and legal literature exists which is critical of the purpose and conduct of the war trials of Nazi leaders at Nuremberg and of Japanese military leaders in the Pacific. Significant differences of opinion remain as to the propriety of those proceedings. It is a historical verity that the victors in war have meted out punishment to the vanquished in the name of justice. The Court does not pass judgment on this issue or the manner in which some of the post-war proceedings were conducted, leaving that verdict to time and its observers, the historians. It is, nonetheless, well-established that extraterritorial offenses were tried by these tribunals without objection by members of the international community.

11. The definition of these crimes, as set forth in Article 6 of the Charter annexed to the London Agreement almost exactly parallels the Nazi statute. The Charter provides in relevant part:

> The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of the organizations, committed any of the following crimes.
>
> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
>
> . . .

(Continued on following page)

which were committed outside of the territory of the four Allies. The international community affirmed and endorsed the work of the tribunals and the principles of law they envoked, through a General Assembly Resolution. G.A. Res. 95 (A/64/Add. 1) p. 188 (1946); *see also* Moeller, "United States Treatment of Alleged Nazi War Criminals: International Law, Immigration Law, and the Need for International Cooperation" (draft manuscript), to be published in 25 *Va. J. Int'l L.* (summer 1985).

In a number of cases brought before United States military tribunals, defendants accused of war crimes objected to the assertion of jurisdiction because the crimes were not committed on United States territory or in the United States territorial zone of occupation in Germany. These defenses were uniformly rejected. In asserting jurisdiction, United States military courts discussed the universality of jurisdiction over war crimes. For example, in *United States v. Waldeck, et al.*, Case No. 000-50-9 (DJAWC, Nov. 15, 1947), the defendants were physicians, guards and officials of the Buchenwald concentration camp in Germany. They were, variously, charged with and

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Footnote continued—

> (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. . . .

found guilty of "killings, beatings, tortures, starvation" and other abuses. In finding jurisdiction over acts in violation of the law of war committed against the nationals of any country, at any place, prior to the entry of the United States into the war, the Court stated:

> Any violation of the law of nations encroaches upon and injures the interest of sovereign states. Whether the power to punish for such crimes will be exercised in a particular case is a matter resting within the discretion of a state. However, it is axiomatic that a state, adhering to the law of war which forms a part of the law of nations, is interested in the preservation and the enforcement thereof. This is true, irrespective of when or where the crime was committed, the belligerency status of the punishing power, or the nationality of the victims. (citations omitted)

United States v. Waldeck, at 34. *Accord United States v. Brust; United States v. Otto.*

Both France and Norway enacted legislation which provided for the trial of war criminals who committed extraterritorial offenses against their nationals or their state interests. *See* Baxter, "Jurisdiction Over War Crimes and Crimes Against Humanity: Individual and State Accountability", Bassiouni and Nanda (eds.) II *International Criminal Law* at 65, 67-68 (1973). No evidence has been presented or found which indicates that the international community objected to the Allies' assertion of jurisdiction over extraterritorial war crimes and crimes against humanity.

The work of the United Nations and its various organizations after World War II further shows the interest

of the international community in the prosecution of war crimes, including crimes against humanity, which occurred in execution of or in connection with other war crimes. At the request of the United Nations General Assembly, the International Law Commission of the United Nations formulated "Nuremberg Principles", Report of the International Law Commission covering its Second Session, 5 U.N. GAOR, Supp. 12, pt. 111, U.N. Doc. A/1316 (1950), which described crimes against peace, war crimes, and crimes against humanity as "international crime[s]." *See also* Appleman, *Military Tribunals and International Crimes* 368-72 (1954). In addition, the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 78 UN.T.S. 277 (opened for signature December 9, 1948) [hereinafter "Genocide Convention"], was adopted by the United Nations General Assembly in 1948, G.A. Res. 260(A), U.N. Doc. A/810 at 174 (1948) and has been ratified by 93 nations.[12] The Convention "confirms" that genocide is "a crime under international law" and defines genocide to include various acts, including "killing" and "causing serious bodily or mental

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12. The United States has signed the Convention but, to date, has not ratified it. Despite the activism of the United States delegation in promoting the Convention (and lobbying, against the Soviet Union, for the inclusion of political groups as a protected class from oppression), the Senate entertained arguments that under the Constitution genocide was purely "domestic matter." L. Kuper, *Genocide* 29-30 (1981). In addition, there was fear among some Senators that the United States would be charged with genocidal violations for segregationist laws or policies against blacks in America. Latter-day critics of the Convention may believe continued opposition to its ratification is merited given charges that United States involvement in the Vietnam War rises to genocidal proportions. *See* R. Falk, *Crimes of War* (1971); *From Nuremburg to My Lai* (ed. J. Baird 1972). In any event, it would seem that United States non-ratification of the Genocide Convention has largely been motivated by fear of domestic political repercussions rather than any fundamental disagreement with the core meaning or purpose of the Convention.

harm" which were committed "with intent to destroy . . . a national, ethnical, racial or religious group". Convention, arts. 1, 2. The Contracting Parties undertake "to prevent and to punish" genocide. Convention, art. 1.

Respondent states that no jurisdiction arises under the principle of universality. He argues that only Congress, pursuant to the United States Constitution Article I, section 8, clause 10 (power to define offenses against the laws of nations), or the President, with the advice and consent of the Senate, pursuant to Article II, section 2, clause 2 of the Constitution (treaty-making power) has the power to "define a universal crime." Motion to Terminate at 16-17. Respondent claims that "the Laws of Nations cannot be broadly applied as a basis for federal jurisdiction over a case." *Id.* at 18. Respondent mischaracterizes the issue pertaining to universality. This Court must only determine whether Israel can assert jurisdiction over the alleged offenses, not whether Congress has defined the offenses as universal crimes or whether a United States court could try respondent for the alleged crimes under United States law. This Court has jurisdiction to conduct an *extradition* proceeding, pursuant to 18 U.S.C. § 3184. Order of February 21, 1985; Order of March 8, 1985.

Respondent cites no authority to show that Israel would violate international law in the instant case by asserting jurisdiction over respondent based on the universality principle. Israel has brought charges of "murder" against Demjanjuk, asserting jurisdiction based on a statute which penalizes "war crimes" and "crimes against humanity", among other acts. The international community has determined that these offenses are crimes over which universal jurisdiction exists. *Supra* at 21-26 [A60-A66].

Moreover, Israel's assertion of jurisdiction does not impinge or interfere with any other state's jurisdiction since no other nation has requested respondent's extradition.

A colorable argument has been made that Israel has jurisdiction to try respondent, based on the "protective" and "passive personality" theories of jurisdiction. The Court, however, need not determine whether Israel's assertion of jurisdiction on these bases is in conformity with international law because the Court finds that Israel has properly asserted jurisdiction under international law, pursuant to the universality principle.[13]

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13. Israel may be able to assert jurisdiction to try respondent, pursuant to the Nazi statute based on the "protective" principle. International law has recognized a state's right to punish certain conduct occurring outside its territory by persons who are not its nationals when the conduct is directed against the security of the state or against important state interests or functions. Restatement § 402(3) and § 402 Comment (d). The regulated actions must have a demonstrable, adverse affect on the regulating state in particular, or at least a potentially adverse affect on that state. *United States v. James-Robinson*, 515 F. Supp. 1340, 1345 (S.D. Fla. 1981). The crimes subject to such jurisdiction have included: espionage, counterfeiting of the state's seal or currency, the falsification of official documents, perjury before consular officials and conspiracies to violate a state's immigration or customs laws. Restatement § 402, Comment (d).

United States statutes and courts have recognized the protective principle's validity in several contexts. Restatement § 403 Reporters' Note 7. *See e.g., United States v. Pizzaruzzo*, 388 F.2d 8 (2d Cir. 1966), *cert. denied*, 392 U.S. 936 (1968) (knowingly making a false statement on a visa application to enter the United States); *Rocha v. United States*, 288 F.2d 545 (9th Cir. 1961), *cert. denied*, 366 U.S. 948 (1961), (sham marriages abroad to make unlawful entries as immigrants). In recent years, United States courts have used the principle to uphold extraterritorial jurisdiction over narcotics traffickers. *Accord United States v. Postal*, 589 F.2d 862, 886 n. 39 (5th Cir. 1979); *United States v. King*, 552 F.2d 833, 851 (9th Cir. 1976) *cert. denied*, 430 U.S. 966 (1977); *United States v. Angola*, 514 F. Supp. 933 (S.D. Fla. 1981). *See also* Note, "Trends in Extraterritorial Narcotics Control: "Slamming the Stable Door After the Horse has Bolted", 16 *N.Y.U.J. Int'l L & Pol.* 353, 374-90

(Continued on following page)

B. *Charges Within the Treaty*

Respondent argues that the crimes he is charged with do not "conform to the letter or intent of the U.S.-Israel Extradition Treaty." Motion to Terminate at 23. He argues that:

> . . . The alleged "crime against the Jewish people" does not in any way conform to the letter or intent of the U.S. - Israel Extradition Treaty (14 U.S.T. 1708). The list of Extraditable Crimes under Article II of the Treaty exhibits no language encompassing war crimes, genocide, crimes against "persecuted people" or persecuted nationalities. The specific acts and intent which must be demonstrated under the Law of Israel (*Nazi and Nazi Collaborators (Punishment) Law*), in order to confer extraterritorial jurisdiction, under Israeli Domestic Law, and in Israel's view under the substantive International Law, automatically eliminate

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Footnote continued—

(1984). These courts have reasoned that vessels in close proximity to the United States, full of illegal drugs, represent a real potential for harm to the effective administration of United States' customs and narcotics laws, which reflect a strong governmental interest. *United States v. Angola,* 514 F. Supp. at 936.

In the instant case, it has been argued that important state interests of Israel were affected by the acts alleged. Brief of *Amicus Curiae* (The International Human Rights Law Group (filed April 10, 1984) at 42-45).

Israel may be able to assert jurisdiction based on the "passive personality" theory. Under that theory, a state may, in certain circumstances, apply its criminal law to an act committed outside its territory by a person not its national, because the victim of the act was its national. Restatement § 402, Comment (e); *id.* The validity of this theory in international law is in doubt. Restatement § 402, Comment (e). And, the victims of the alleged crimes were, of course, not Israeli citizens. Nonetheless, it is possible that Israel may assert jurisdiction here because of its close nexus with the victims. *See* Brief of *Amicus Curiae* at 42-44.

the Israeli charge and the acts supporting the charge, from the category of statutory murder. The crime of murder set out in Article II of the Treaty excludes the elements of the offense of genocide or war crimes.

. . .

Motion to Terminate at 23. The Treaty provides, in relevant part:

Article I

Each Contracting Party agrees, under the conditions and circumstances established by the present Convention, reciprocally to deliver up persons found in its territory who have been charged with or convicted of any of the offenses mentioned in Article II of the present Convention committed within the territorial jurisdiction of the other, or outside thereof under the conditions specified in Article III of the present Convention.

Article II

Persons shall be delivered up according to the provisions of the present Convention for prosecution when they have been charged with, or to undergo sentence when they have been convicted of, any of the following offenses:

1. Murder.
2. Manslaughter.
3. Malicious wounding; inflicting grievous bodily harm. . . .

Article III

When the offense has been committed outside the territorial jurisdiction of the requesting Party, extra-

> dition need not be granted unless the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances. . . .

Respondent is correct in asserting that the crimes for which Demjanjuk is charged must fall within the treaty provisions for Demjanjuk to be found extraditable.

The Arrest Warrant-Exhibit J charges respondent with "Crimes against the Nazi and Nazi Collaborators (Punishment) Law, 5710-1950". The Warrant Request Exhibit J more fully sets forth the charges:

> Details of the offense(s): The suspect, nicknamed "Ivan the Terrible", was a member of the S.S., and in the years 1942 - 1943 operated the gas chambers to exterminate prisoners at the Treblinka death camp in the Lublin area of Poland, which was occupied by the Nazis during the Second World War. The suspect murdered tens of thousands of Jews, as well as non-Jews, killing them, injuring them, causing them serious bodily and mental harm and subjected them to living conditions calculated to bring about their physical destruction. The suspect committed these acts with the intention of destroying the Jewish people and to commit crimes against humanity.
>
> Paragraph(s) of the charges: Paragraphs 1, 2, 3, and 4 of the Nazi and Nazi Collaborators (Punishment) Law, 5710-1950.

In addition, the eyewitness statements in the Israeli Extradition Request allege specific instances of killings, beatings, and injuries inflicted by respondent.[14]

For the reasons set forth below, this Court finds that some of the charges alleged against Demjanjuk are of-

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14. See *infra* at 37-41 [A79-A83].

fenses for which he is extraditable under Article III of the Treaty and are offenses mentioned in Article II of the Treaty.

1. Extraditable Charges.

Demjanjuk is charged with murdering thousands of Jews and non-Jews while operating the gas chambers to exterminate prisoners at Treblinka. Warrant Request-Exhibit J. The Government's Complaint states that respondent "is duly and legally charged with having committed the crimes of murder and malicious wounding; inflicting grievous bodily harm" and that the said crimes are "among the offenses enumerated in Article II" of the Treaty. This Court finds that Israel seeks Demjanjuk's extradition for trial on charges of murder, pursuant to sections 1(b) and 2(f) of the Nazi statute, and that those charges are recognized as crimes under Article II of the Treaty.

In addition to the charges of multiple murder, the Warrant Request-Exhibit J and Arrest Warrant-Exhibit J charge Demjanjuk with a number of other crimes, pursuant to the Nazi Statute, sections 1-4. Implicitly recognizing that extradition is limited to offenses set forth in Article II of the Treaty, the United States Attorney for the Northern District of Ohio has requested Demjanjuk's extradition only for the crimes of murder, manslaughter and malicious wounding; inflicting grievous harm. Government Complaint at 1; Tr. at 40-44. Thus, the Court simply notes that Demjanjuk is non-etraditable for any of the other charges included in the Warrant Request-Exhibit J and Arrest Warrant-Exhibit J.

Furthermore, bars to extradition are normally discussed *after* a party is found otherwise extraditable. In the interest of clarity, however, the Treaty's time-bar, Article V(3), (its reference to statutes of limitations) is

addressed at this point. Article V(3) of the Treaty provides, in relevant part, that when the prosecution of a person would be barred by lapse of time according to the laws of the requested party, had the offense been committed in its territory, extradition shall not be granted. As the Government has acknowledged, Government's Prehearing Memorandum (April 19, 1984) at 50; March Tr. at 22, prosecution today on charges of manslaughter and causing grievous bodily harm stemming from acts that occurred during 1942 to 1944 would be barred by statutes of limitations in the United States and Ohio. 18 U.S.C. § 3282; Ohio Revised Code § 2901.13. Extradition on those charges is barred. There are no applicable statutes of limitations for the crime of murder in the United States. 18 U.S.C. § 3281; Ohio Revised Code § 2901.13. Article V(3) does not bar extradition for murder.

2. Article III.

Article III is applicable when the offense charged is included in Article I and the offense was committed outside the territorial jurisdiction of the requesting state, in this case, Israel.[15] Respondent is accused of offenses which occured in Poland. Because they were committed outside the territorial jurisdiction of Israel, Article III is applicable.

If the extraterritorial offense charged is punishable in the requested state "under similar circumstances", the requested state *must* extradite the accused subject to the other articles of the Treaty. If the offense charged is *not* prosecutable under the laws of the requested party, extradition "need not" be granted, *i.e.*, extradition is discretionary. Nonetheless, the extradition court must make

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15. The interpretation of this Treaty provision appears to be an issue of first impression.

a legal determination as to the accused's extraditability pursuant to the treaty involved and 18 U.S.C. § 3184. *Accord Assarsson,* 635 F.2d 1237, 1244-45 (7th Cir. 1980); (interpretation of a virtually identical extraterritoriality provision in the United States-Sweden Treaty of Extradition, 14 U.S.T. 1845, which was ratified by the United States Senate on the same day as the United States-Israel Treaty), *cert. denied,* 451 U.S. 939 (1981); *Assarsson,* 687 F.2d 1157 (8th Cir. 1982); *see also Shapiro v. Ferrandina,* 478 F.2d 894, 906 (2d Cir. 1973), *cert. dismissed,* 414 U.S. 884 (1973).

The United States does recognize the criminality of the alleged acts. The United States participated in the Nuremberg trials where individuals were punished for atrocities they had committed in exterminating civilian populations. *See e.g., The Nurnberg Trial,* 6 F.R.D. 69, 158-59, 160-61, 172-73 (defendants Frank, Frick, von Schirach). In addition, United States military tribunals tried individuals for the horrible acts they committed in concentrations camps. *See supra* at 23-24. Furthermore, both Congress and the Executive Branch, through the State Department, made clear that they regarded wholesale murder, torture and other inhumane treatment of civilians as prosecutable crimes. *See e.g.,* H. Con. Res 39, 79th Cong., 1st Sess. (1945); "Punishment of War Criminals", 12 Dep't State Bull. 154 (1945). Current United States law, however, does not provide for the *trial* and *punishment* of persons accused of murdering civilians in Nazi concentration camps in Europe during World War II. "Similar circumstances", therefore, are lacking. Thus, the decision to extradite respondent is discretionary. Pursuant to Article III, it is the Court's duty to certify whether respondent can be extradited. The Executive branch must determine whether a respondent actually will be extradited.

3. Article II.

Demjanjuk argues that the murder charges alleged are not within the Treaty because the Treaty does not include war crimes, genocide or crimes against persecuted nationalities. This argument has no basis in either the Treaty or American legal principles.

First, the Treaty does not explicitly exclude murder of civilians occurring during wartime or motivated by racial or religious hatred. There is no reason to presume that the Treaty drafters intended to extradite for "murder" and not for "mass murders". *Cf. Factor v. Laubenheimer,* 290 U.S. 276, 298 (1933). Extradition treaties historically have provided for the extradition of those accused of serious, rather than lesser, crimes. *See United States v. Rauscher,* 119 U.S. 407, 420 (1886). Demjanjuk is certainly charged with very serious crimes—with offenses "against such laws as [are] essential to the protection of life, liberty, and person." *Id.* Governments have historically been very willing to deliver up to the appropriate authorities offenders of those laws. It is illogical to assume that the Treaty drafters intended to exclude mass murder, regardless of the motivation behind the murders, or how the murders are labelled. As the Supreme Court said in *Collins v. Loisel*:

> The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions. (citations omitted).

259 U.S. 309, 312 (1921). It is not material here that the Treaty does not refer to the crimes respondent is charged with in the same words as the Warrant Request.

Respondent's argument, based on his literal, and technical reading of the Treaty and the charges, leads to an absurdity: that is, one who kills an individual is extraditable but one who kills many is not extradictable. Clearly, the law recognizes varying degrees of murder. But it is implicit that when one seeks to intentionally kill hundreds, he necessarily has the requisite intent to kill each individual. The destruction of a group presupposes the destruction of its individual constituent members. Demjanjuk is charged with multiple murders, committed within the context of an over-all scheme of extermination. There is nothing in the Treaty to indicate that murders predicate on certain motives, such as racial or religious hatred, are non-extraditable. The motives for the commission of the crimes are immaterial for the purpose of determining extraditability.[16] *See In the Matter of the Extradition of Andrija Artukovic*, Case No. CV-8743-R (B), slip op. at 9 (C.D. Cal. March 4, 1985).

Second, at the time the Treaty was prepared and signed, the Nazi Statute was in effect and persons had been prosecuted and convicted of extraterritorial crimes pursuant to the Nazi Statute. *See Attorney General v. Eichman*, 56 *Am. J. Int'l* 805; Comment, "Fedorenko v. United States: War Crimes, the Defense of Duress and American Nationality Law", 82 *Colum. L. Rev.* 120, 168 (1982) (cases discussed at note 156). The drafters could have excluded charges under this statute from the Treaty—or even all charges arising during the World War II period—had they wished to do so. Article 21 of the extradition treaty between Israel and Canada explicitly excludes "offenses committed or convictions which have taken place" before the treaty was signed. Extradition Agreement Between the Government of the State of Israel and the Government of Canada, [1970] U.N.T.S. 270 (entered into force Decem-

16. See infra at 48-51 [A91-A94] (discussion of the political offense exception).

ber 19, 1969). The United States-Israel Treaty contains no such limitation or exclusion.

Third, the Assistant Legal Adviser for the Law Enforcement and Intelligence Section of the Department of State in Government Exhibit 4 has declared that "[t]he offense for which Mr. Demjanjuk's extradition [is sought] is covered by Article II of the Treaty. . ." Such a declaration is not dispositive in judicial proceedings. Nevertheless, in resolving questions of treaty interpretation, statements of the United States Department of State are entitled to great weight. *Factor,* 290 U.S. at 295; *Sayne v. Shipley,* 418 F.2d 679, 685 (Fifth Cir. 1969), *cert. denied,* 398 U.S. 903 (1970). In the instant case, the Court accepts the Executive branch's interpretation of Article II of the Treaty, finding it well-founded and supported by the weight of legal authority.

Fourth, United States courts have clearly established that extradition treaties are to be liberally construed so as to effect the apparent intention of the parties. *Valentine v. U.S. ex rel. Neidecker,* 299 U.S. 5, 10 (1936); *Factor,* 290 U.S. at 293-94. Extradition treaties are intended to secure the surrender of alleged criminals so that they can be tried for the offenses charged. *See* 290 U.S. at 293; *see also id.* at 318 (Butler, J. dissenting). The surrender of such persons involves no impairment of any legitimate public or private interest. *Id.* at 298. Rather, an obligation to extradite, in the interests of justice and friendly international relations, should be honored whenever possible. *Id.*

Thus, even if the Treaty here could fairly be interpreted to exclude mass murders, such an interpretation, which would restrict Israel's rights under the Treaty, is disfavored. *Accord Factor,* 290 U.S. at 294. This Court's

role is limited to certifying extraditability under the Treaty. It should be left to the Secretary of State and other members of the Executive Branch to ultimately determine whether to extradite respondent since the conduct of foreign affairs and United States relations with Israel are almost exclusively an executive function. *Accord Shapiro*, 478 F.2d at 906.

V.

PROBABLE CAUSE

The final function of the extradition court is to determine whether there is "competent and adequate evidence" or "probable cause" to believe respondent committed the acts with which he is charged. 18 U.S.C. § 3184; *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *Bingham v. Bradley*, 241 U.S. 511, 516-17 (1916); *Shapiro v. Farrandina*, 478 F.2d 894, 904-05, 913-14 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973); *Jimenez v. Aristequieta*, 311 F.2d 547, 562 (5th Cir. 1962).

The weight and sufficiency of that evidence to establish probable cause is for the determination of the committing court. *Gusikoff v. United States*, 620 F.2d 459, 462 (5th Cir. 1980); *Garcia-Guillern v. United States*, 450 F.2d 1189, 1192 (5th Cir. 1971). Once again, the Government and the requesting country are not required to show actual guilt, that the person sought committed the crime. The only requirement is that there be probable cause to believe the fugitive is guilty. "The extradition court does not inquire into the guilt or innocence of the accused. [It] looks only to see if there is evidence sufficient to show reasonable ground to believe the accused guilty." *Sayne v. Shipley*, 418 F.2d 679, 685 (5th Cir. 1969).

In making a finding that probable cause exists for extradition, the Court is required to examine whether probable cause exists for each *specific charge* which forms the basis for extradition. Several courts have stated that such a determination is necessary in order to clearly resolve issues of dual criminality and specialty which arise in the interpretation of extradition treaties.[17] *Artukovic*, slip. op. at 1; *Caplan v. Vokes*, 649 F.2d 1336, 1343-44 (9th Cir. 1981); *Shapiro*, 478 F.2d 894, 905-09 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973). The extradition record must demonstrate "coherent legal connections between the factual allegations and extraditable offenses." *Caplan*, 649 F.2d at 1344.

This Court has already determined that respondent is not extraditable for the offenses of "manslaughter and malicious wounding; causing grievous bodily harm" since those offenses are time-barred by the United States and

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17. The principle of specialty limits prosecution in the requesting country to those extraditable offenses established by the facts on which extradition has been granted by the asylum [requested] country. The dual criminality principle makes an offense non-extraditable unless it is criminal in both the requesting and the requested states' jurisdictions. *Caplan*, 649 F.2d at 1343. The Court has determined as will be discussed below that the common law principle of "dual criminality" is inapplicable to the instant case since the U.S.-Israel extradition treaty governs. See *infra* at 48 [A90-A91].

Article XIII of the Treaty incorporates the principle of specialty. It provides in relevant part, that

> A person extradited under the present Convention shall not be detained, tried or punished in the territory of the requesting Party for any offense other than that for which extradition has been granted nor be extradited by that Party to a third State. . .

Pursuant to Article XIII, respondent may be extradited to Israel only to stand trial for the offenses for which this Court has certified that there is probable cause to indicate that respondent committed the crimes. *Accord Shapiro*, 478 F.2d at 906-911; *see also Fiocconi v. Attorney General*, 462 F.2d 475 (2d Cir. 1972); *United States v. Parovtian*, 299 F.2d 486 (2d Cir. 1962).

the Ohio statute of limitations. *Supra* at A71. Since there is no comparable statute of limitation for the crime of "murder," the Court has determined that Article V(3)'s time bar does not prohibit respondent's extradition for murder. It is therefore necessary to establish the factual and legal nexus between the *acts* respondent is alleged to have committed and the *crimes* for which extradition is granted. *See Shapiro,* 478 F.2d at 907. That "legal nexus" constitutes the finding of probable cause the extradition court must make.

The nature of the Court's inquiry into the identification of respondent required a probable cause determination which in many ways overlaps with the probable cause finding required here. In other words, the Court has already found that the eyewitness affidavits and supplementary statements establish probable cause to believe that respondent is the person accused and named in the Arrest Warrant. These same affidavits and supplementary statements also are sufficient to place the respondent at the site where the alleged crimes occurred, namely the Treblinka camp in the years 1942-43. However, the next step which must be taken is to identify those alleged acts which respondent committed while *at that site and at that time* and to determine whether those specific acts constitute the extradictable offense of murder.

The eyewitness testimony of Elijahu Rosenberg identifies respondent as a guard of the gas chamber at the Treblinka camp, where Rosenberg was a prisoner in 1942 and 1943. March Tr. at 27. Rosenberg identified respondent as one of two Ukranians who operated the gas chambers. March Tr. at 28. Rosenberg states that he himself saw respondent at the gas chambers "[e]very day, whenever there were transports." *Id.* at 29. He stated that

after the respondent and the other guard herded prisoners into the gas chambers, "[t]hey returned to the room where the motor was, and they activated the motor." *Id.* at 29.[18]

It is known that the gas chambers at the various camps throughout Europe during the Nazi period were created for the express purpose of killing individuals as part of the Nazi's "Final Solution." Treblinka's principal purpose was to kill all the Jews from the Warsaw ghetto. W. Shirer, *The Rise and Fall of the Third Reich* 968, 975, 857 (1960). Although experimentation with killing by asphyxiation had begun as early as 1941 (mobile killing vans), by 1942 at the Treblinka camp, the Nazis were using carbon monoxide gas from diesel engines, the fumes of which were introduced into a sealed chamber containing prisoners. Hydrogen cyanide was later chosen for use at Auschwitz when SS Commander Rudolph Hoess determined that Treblinka's carbon monoxide method was not "very efficient," i.e. did not kill quickly enough. *See, e.g., United States v. Fedorenko,* 455 F. Supp. 893, 901-02 n. 12 (S.D. Fla. 1978), *rev'd,* 597 F.2d 946 (5th Cir. 1979), *reh'g denied,* 601 F.2d 1195, *aff'd on other grounds,* 49 U.S. 490 (1981); R. Hilberg, *The Destruction of the European Jews* 219, 441, 561-72 (1961); Shirer, *supra,* at 967-69. Treblinka had 10 gas chambers which

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18. Witness Rosenberg also testified that respondent beat and "tortured" prisoners with a whip, a sword and a pipe. March Tr. at 29. He does not specifically state the prisoners died from such acts. Since the Court has ruled that respondent cannot be extradited for "malicious wounding; grievous bodily harm," these acts of beating are not presented as factual elements in the probable cause determination for the extraditable offense of murder. Of course, such acts are properly within the scope of consideration for the United States Executive Branch in making its decision to extradite and the Israeli trial court in considering the degree of the crime and severity of punishment, if guilt is found, for the offense of murder.

accommodated 200 people each. *Shirer, supra,* at 968. The Court describes the operations of these monstrous "gas chambers" in order to make it clear that if respondent activated the motor for the gas chamber, as Rosenberg notes, then there is probable cause to believe he committed murder since: (i) these chambers were specifically created for the purpose of killing; and (ii) death by asphyxiation is a foreseeable consequence of the inhalation of carbon monoxide.

Witness Rosenberg has stated that dead bodies were removed from the gas chambers approximately half-an-hour to an hour after the motor was activated. March Tr. at 28, 32. Rosenberg stated in his supplemental affidavit that he removed "with his own hands" the bodies of his first cousin, Devora Shifran, and his neighbor, Efraim Weinstein, from the gas chamber. March Tr. at 32. Rosenberg did not specifically state that respondent was operating the gas chamber at the time Shifran and Weinstein were gassed, but since only two Ukranians have been identified as operating the chambers, it may be inferred for the purpose of determining probable cause that respondent was operating the chamber at the time of Shifran and Weinstein's death.

Witness Rosenberg in his supplemental statement made under oath before a magistrate in Jerusalem also stated that "[a]t the Treblinka camp, many persons were also murdered outside the gas chambers." He could not recall the names but he mentioned the case of his cousin David Auslander. March Tr. at 31. Rosenberg states that respondent took a sword and cut off the ear of Auslander as Auslander was taking a corpse to the burial pit. Rosenberg said that Auslander did not return from the burial pit. "By cutting off my cousin's ear, Ivan, in effect, caused

his death." *Id.* Although witness Rosenberg did not see Auslander actually die, Rosenberg stated that any prisoner who appeared wounded would be shot to death when he appeared at the edge of the pit. Government Exhibit 3, Statement of Elijahu Rosenberg (item ER/2) at 1. Therefore, the Court finds sufficient evidence to conclude that probable cause exists for charging respondent with the murder of David Auslander. Issues of medical and legal causation are for the trial court to determine.

Witness Pinhas Epstein has also stated that he saw the gas chambers at Treblinka in 1942-43 operated by two Ukranians, one of whom was respondent. March Tr. at 34. Epstein states that he also observed Ivan entering and operating the engine room. March Tr. at 38. He identifies six members of his family, including his parents and siblings, who were killed in the gas chambers. March Tr. at 38. Witness Epstein in his supplemental affidavit sworn to a magistrate in Jerusalem on February 5, 1984 described seeing respondent beat prisoners with an iron pipe "to split the heads of a number of prisoners . . . [with the result that] the brains of these victims [were] spilling out on the ground and that Ivan killed him [sic] with his blows." Epstein specifically identified Zigmond Eleibaum as one of these victims killed by blows to the head. March Tr. at 37.

Epstein also states that respondent hung three prisoners after torturing them, including Michelle and Moishe. "I wish to make it clear that Ivan took part in hanging these three and that they were hung by a rope to a tree until they died. I, myself, saw that these three were killed in this way." March Tr. at 37.

Witness Joseph Czarny, who was a prisoner at Treblinka from 1942 to 1943, in a statement at National Police

Headquarters in Tel Aviv on September 21, 1976, stated that he saw respondent at Treblinka "convey[ing] people into the gas chambers." Czarny also states that he saw respondent and "Lalka, Kurt Franz [shoot] people dead." March Tr. at 43. Czarny stated that he saw respondent shoot a "carrier [of a] dead person" after respondent had cut off the carrier's ear. March Tr. at 46.

It is unnecessary to pass on every shred of evidence detailing eyewitness accounts of acts allegedly committed by respondent which can support a probable cause finding. The quantity of evidence necessary for a determination of probable cause, as well as its weight and sufficiency, is a matter for the extradition court's discretion. *Gusikoff*, 620 F.2d at 462. It is enough in this case, after examining the statements of just three witnesses, to conclude that there is sufficient evidence to find probable cause that respondent, while serving as a guard at the Treblinka camp in 1942-1943, committed murders of: (i) uncounted numbers of prisoners, including Shifran, Weinstein, and members of Epstein's family, who died of asphyxiation in the gas chambers which respondent operated; (ii) David Auslander, Elijahu Rosenberg's cousin, who may have bled to death or been shot after his ear was cut off by respondent; (iii) Zigmond Eleibaum, who died from blows to the head, as seen by Epstein; (iv) Michelle, Moishe and a third prisoner who were hung by respondent, as observed by Epstein; (v) the carrier of corpses who was shot by respondent, as stated by Czarny. In sum, the Court finds from a review of the evidence submitted that probable cause exists to believe respondent committed multiple acts of murder and that he may be extradicted to Israel for those murders.

VI.

DEFENSES

All of the prerequisites for extradition pursuant to the Treaty and 18 U.S.C. §3184 have been met. Thus, the only remaining issue before this Court is whether this case falls within any of the provisions of the Treaty which prohibit or limit extradition. Respondent has raised several defenses to a finding of extraditability. As will be shown below, these defenses lack merit.[19]

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19. In addition to the four defenses discussed in the text, Demjanjuk claims:

(i) That his extradition is prohibited by the time-bar included in Article VI(3). This argument is valid with respect to some of the charges alleged and has been discussed above. *See supra* at 30 [A71-A72].

(ii) That he is not a "fugitive" because he has never been in the State of Israel nor did he flee from that jurisdiction. This argument is rejected. Israel may assert jurisdiction over Demjanjuk, even if he is not an Israeli citizen. *See* Article IV; *Eain v. Wilkes,* 641 F.2d 504 (Palestinian terrorist who was a citizen of neither the United States nor Israel extradited to Israel, pursuant to the Treaty). The propriety of Israel's assertion of jurisdiction in the instant case has been discussed in detail above. Israeli jurisdiction does not rest on the physical location of the alleged perpetrator. Furthermore, Demjanjuk's claim that he is not a fugitive and, thus, is non-extraditable lacks merit. *In re Ryan,* 300 F. Supp. 270, 272 n.4; *United States ex rel. Eatessami v. Marasco,* 275 F. Supp. 492, 496 (S.D. N.Y. 1967).

(iii) That his extradition is barred by Article VII of the Treaty because the Nazi statute provides for the imposition of the death penalty. Article VII provides that:

> When the offense for which the extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused unless the requesting Party provides such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

The United States and the State of Ohio allow the death penalty to be imposed for murder of the type and magnitude alleged.

(Continued on following page)

A. *Israeli Statute is not Ex Post Facto*

Respondent argues that Demjanjuk is not extraditable under 18 U.S.C. §3184 because the Israeli statutes breaches Israel's obligations in international law and violates the United States Constitution because the statute is *ex post facto*. *See* Motion to Terminate at 7-11. Respondent's arguments and conclusion are erroneous.

Under international law, a law which renders an act criminal when the act was not criminal at the time it was committed may be a forbidden *ex post facto* law. This issue need not be reached today because the Nazi and Nazi Collaborators (Punishment) Law is *not* an *ex post facto* law. The Israel statute does not declare unlawful what had been lawful before; rather, it provides a new forum in which to bring to trial persons for conduct previously recognized as criminal. Defendants prosecuted under the statute would have been subject to the criminal jurisdiction of the state where the acts occurred, as well as the jurisdiction of the Allies' military tribunals and possibly German courts. *See supra* at 20-24 [A59-A64]; Order of March 8, 1985 at 10-12.

Respondent is charged with offenses that were criminal at the time they were carried out. At the time in question, the murder of defenseless civilians during war

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Footnote continued—

18 U.S.C. § 1111 (murder designated a capital offense); Ohio Code § 2929.02; *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976). Thus, Article VII may not be applicable. Even if Article VII is deemed to apply, making extradition discretionary, the decision to actually extradite rests in the Executive branch. Article VII cannot be read as a bar to certification of extradition. The Court merely notes at this point that the Executive branch may want to take into account the humanitarian concerns behind Article VII in deciding whether to seek assurance from the State of Israel that Demjanjuk will be fairly treated in all respects, before Demjanjuk is surrendered.

time was illegal under international law. The Hague Conventions of 1899 and 1907 Respecting the Laws and Customs of War on Land, 32 Stat. 1779, *signed* July 28, 1899, *ratified* (by the United States) April 9, 1902; 36 Stat. 2199, *signed* October 18, 1907, *ratified* (by the United States) November 27, 1909, both expressly forbid the killing of defenseless persons, even when they are enemy nationals, article 23(b), (c), and forbid "general penalties" against populations, article 50. The Convention's rules were binding on parties to the Convention, including Germany, and, by 1939, were recognized by all civilized nations and regarded as declaratory of the laws and customs of war.[20] *The Nurnberg Trial*, 6 F.R.D. at 131. *See also* London Agreement *supra* at 22, "Moscow Declaration of German Atrocities", 9 Dep't State Bull. 310 (November 1, 1943) (signed by Roosevelt, Churchill, Stalin); "Crimes Against Civilian Populations in Occupied Countries", 7 Dept's State Bull. 709, 710 (1942) (statement by President Roosevelt) (Allied declarations about the criminality under law of acts being perpetrated on civilian population). Furthermore, it is absurd to argue that operating gas chambers, and torturing and killing unarmed prisoners were not illegal acts under the laws and standards of every civilized nation in 1942-43. Murder is *malum in se*. *See Fedorenko*, 455 F.Supp. at 901-02 n. 12 (discussion of Treblinka death camp's operations).

The Israeli statute merely provides Israeli courts with jurisdiction to try persons accused of certain crimes committed extraterritorially and establishes judicial procedures and applicable penalties. *See Calder v. Bull*, 3 Dall. (U.S.)

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20. Because the atrocities charged occurred during World War II, the Court need not reach the question of whether crimes committed against civilian populations before World War II are prohibited under international law. *See* 6 F.R.D. at 13.

386, 390-93 (1797) (discussion of *ex post facto* laws, as prohibited in the United States Constitution); *Cook v. United States*, 138 U.S. 157, 183 (1891). Similarly, the Nuremberg International Military Tribunal provided a new forum in which to prosecute persons accused of war crimes committed during World War II pursuant to an agreement of the wartime Allies, *see The Nurnberg Trial*, 6 F.R.D. 69. That tribunal consistently rejected defendants' claims that they were being tried under *ex post facto* laws. *Id. See also United States v. Waldeck; United States v. Otto; United States v. Brust.* The statute is not retroactive because it is jurisdictional and does not create a new crime. Thus, Israel has not violated any prohibition against the *ex post facto* application of criminal laws which may exist in international law.[21]

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21. Respondent's argument that the Israeli statute violates the United States Constitution's prohibition against *ex post facto* laws is misplaced. This Court does not have jurisdiction to determine whether Israeli criminal procedure extends to respondent all of the constitutional rights of a defendant in an American court. Due process rights cannot be extended extraterritorially. *Neely v. Henkel*, 180 U.S. 109 (1901); *Kamrin v. United States*, 725 F.2d 1225, 1228 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 85 (1984); *In the Matter of the Extradition of Andrija Artukovic*, CV84-8743 (C.D. Cal., March 5, 1985). This Court is "bound by the existence of an extradition treaty to assume that the trial will be fair." *Glucksman v. Henkel*, 221 U.S. 508, 512 (1911) (J. Holmes). As the Second Circuit held in *Rosado v. Civiletti*, 621 F.2d 1179, 1193 (2d Cir. 1950),

> Even where the treaty fails to secure to those who are extradited to another country the same constitutional safeguards they would enjoy in an American criminal trial, it does not run afoul of the Constitution.

See also Holmes v. Laird, 459 F.2d 1211 (D.C.D.C. 1972), *cert. denied*, 409 U.S. 869 (1972). If there is any discretion not to extradite because of dangers of an unfair trial or persecution, such discretion rests in the Executive Branch. Restatement of the Foreign Relations Law of the United States (Revised), Tentative Draft No. 5 (1984) §386 Comment g.

The Court notes, without deciding, that in all likelihood, the Israeli statute would not be a constitutionally prohibited *ex post facto* law. *Accord Calder v. Bull*, 3 Dall. (U.S.) 386, 390 (1797); *Cook v. United States*, 138 U.S. 157, 183 (1891).

Furthermore, contrary to Demjanjuk's assertions, *Motion to Terminate* at 9, the Israeli statute does not breach Israel's international obligations because the acts alleged preceded the independence of the State of Israel. The criminal law defining and prohibiting murder in the State of Israel today incorporates the 1936 Criminal Code which was in effect in Palestine, pursuant to the authority of the United Kingdom, as Mandatory Power for Palestine under the League of Nations. *See* Rosenne, "The Effect of Change of Sovereignty on Municipal Law," [1950] Brit. Y.B. Int'l L. 267, 284-85. Thus, Israeli courts have asserted the right to try persons accused of committing crimes before Israel's independence, as courts of a successor state. *Accord Attorney General v. Eichman,* 56 *Am. J. Intl.* at 833. This is consistent with United States law, which provides that laws "designed to secure good order and peace in the community, . . . which are strictly of a municipal character" remain in force after a change in government, until the new government acts to alter or repeal the legislation. *Chicago, Rock Island & Pacific Ry. v. McGlinn,* 114 U.S. 542, 546 (1885). Because the 1936 Criminal Code prohibited murder and because the Mandatory Power could have enacted a law providing for the prosecution of extraterritorial war crimes, Israel, as the successor state, can try persons for murders committed during the time of the British Mandate. Thus, Israel's statute is not jurisdictionally defective because it was promulgated after Israel became a State.

There is nothing in the Treaty to indicate that it is not applicable to crimes committed before Israeli statehood. An extradition treaty is to be given retroactive effect, absent an explicit reference in the treaty to the contrary. *Gallina v. Fraser,* 177 F. Supp. 856, 864 (D. Conn. 1959), *aff'd* 278 F.2d 77 (2d Cir. 1960), *cert. denied*

364 U.S. 851 (1960), *reh'g denied*, 364 U.S. 906 (1960). The Treaty does not contain any prohibition against Israel's assertion of jurisdiction over crimes committed during World War II, or crimes committed prior to the time Israel became a state. There is no evidence that the drafters intended to exclude such crimes and no legislative history to indicate that the United States Senate intended the Treaty to be so interpreted. Senate Report of Proceedings, Senate Comm. on Foreign Relations, Convention with Israel at 51-59 (September 25, 1963). Again, murder is *malum in se*. It is illogical to assume that an alleged criminal is not extraditable and, thus, will not be tried for a crime as serious as murder because the crime was committed before the requesting state obtained statehood. Thus, pursuant to the Treaty, the United States is obligated to extradite persons for crimes committed prior to the time Israel became an independent state. Israel's lack of statehood during World War II is not a defense to extradition.

B. *Treaty's "Double Jeopardy" Provision Does Not Bar Extradition.*

Article VI of the Treaty provides that extradition shall not be granted:

> 1. When the person whose surrender is sought is being proceeded against, or has been tried and discharged or punished, in the territory of the requested Party for the offense for which his extradition is requested.

Demjanjuk argues that this provision bars his extradition because the United States government currently is seeking his deportation, based on the same alleged acts and evidence relied on in the Extradition Request. Defendant's

Supplemental Outline Regarding Issues (February 4, 1984) at 10.

This Treaty provision, however, applies only to criminal proceedings in the requested country. *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980) (test for treaty "double jeopardy" protection is "whether the same conduct or transaction underlies the *criminal charges* in both transactions") (emphasis added); *Stowe v. Devoy*, 588 F.2d 336, 340 (2d Cir. 1978) (only double jeopardy problem if the requested person has been or is being tried and subject to punishment for the offense in question), *cert. denied*, 442 U.S. 931 (1979). Neither denaturalization nor deportation proceedings are criminal prosecutions. *Schneiderman v. United States*, 320 U.S. 118, 160 (1943) ("denaturalization suit is not a criminal proceeding"), *reh'g denied*, 320 U.S. 807 (1943); *Fedorenko v. United States*, 449 U.S. 490, 516 (1981) ("a denaturalization action is a suit in equity"); *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) ("deportation is not a punishment for crime"); *Oliver v. I.N.S.*, 517 F.2d 426, 428 (2d Cir. 1975) ("deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure"), *cert. denied*, 423 U.S. 1056 (1976). No evidence has been presented that respondent has been tried or convicted for the crimes alleged in the United States or in any third country, *see* Article VI § 2. Thus, the Treaty's "double jeopardy" prohibition is inapplicable.

C. *"Dual Criminality" Principle Inapplicable*

Respondent argues that for each offense charged, the act committed must be criminal in both Israel and the United States before extradition may be permitted. Motion to Terminate Proceedings at 5, 20. The common law rule

of "dual criminality" is inapplicable to the instant case. In the United States, extradition is governed by treaty. *Factor,* 290 U.S. at 287. Thus, that the offense charged is not a *prosecutable* crime in the United States is not necessarily a bar to extradition. *Assarsson,* 635 F.2d at 1245. If the extradition treaty so provides, the United States may surrender a person to be prosecuted for acts which are not crimes in the United States. *Id.* (quoting *Gallina v. Fraser,* 278 F.2d 77, 79 (2d Cir. 1960); *Factor,* 290 U.S. at 294-301. The crimes charged do fall within the Treaty. *Supra* at 28. Thus, the language of the Extradition Treaty is controlling. The Treaty refutes Demjanjuk's claim that lack of "dual criminality" bars extradition.

D. *"Political Character" Offense Exception Not a Bar.*

Article VI(4) of the Treaty states that extradition shall not be granted

> [W]hen the offense is regarded by the requested Party as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him for an offense of a political character.

Respondent argues that, even if he is otherwise extraditable

> these alleged acts are clearly political in character. At the time of their alleged commission, there was a war and these alleged acts, no matter how barbaric or horrifying, were incidental to the Nazi War effort.

Motion to Terminate at 34.

While the Treaty does include a clause prohibiting extradition for political offenses, the evidence in this case

does not support respondent's allegation that Israel seeks to try him for "political crimes."[22]

For an act to fall within the political offense exception to the Treaty, the Court must determine that there was a violent political disturbance, such as a war, revolution or rebellion, at the time and place of the alleged act and that the acts charged were recognizably incidental to the disturbance. *Accord Eain v. Wilkes,* 641 F.2d 504, 516, 518 (9th Cir. 1981). *See Ornelas v. Ruiz,* 161 U.S. 902 (1896); *In re Castioni,* 1 Q.B. 149 (1891). The definition of "political disturbance" is aimed at acts which disrupt the political structure of a State and not the social structure that established the State. *Eain v. Wilkes,* 647 F.2d 520-21. In determining whether a rational nexus exists between the alleged crimes and the political disturbance, the focus of inquiry is on the circumstances and the status of those harmed and not merely on whether the acts were committed during the disorder. *Artukovic,* slip op. at 6; *See Ornelas v. Ruiz,* 161 U.S. at 511 (1896).

The murder of Jews, gypsies and others at Treblinka was not part of a political disturbance or struggle for political power within the Third Reich. The murders were committed against an innocent civilian population in Poland after the invasion of Poland was completed. No allegations have been advanced, or could be sustained, claiming that those Jews and non-Jews killed were part of an active attempt to change the political structure or overthrow the occupying government. *Cf. Fedorenko,* 455 F.Supp. at 901-02 n.12 (discussion of Treblinka's death camp operations).

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22. To the extent that Demjanjuk attempts to impugn Israel's motives by alleging that extradition for "murder" is sought merely as a subterfuge for trying an individual for political crimes, this question is a matter left to the Executive Branch's discretion. *Eain v. Wilkes,* 641 F.2d 504, 516 (9th Cir. 1981).

Rather, the members of an innocent civilian population were the intended victims of the "Final Solution". The alleged crimes were committed without regard for the political affiliations or governmental or military status of the victims. *Accord Eain v. Wilkes,* 641 F.2d at 522. The civilian status of the victims is also significant because the United States does not regard the indiscriminate use of violence against civilians as a political offense. *Accord Ornelas v. Ruiz,* 161 U.S. at 511; *Eain v. Wilkes,* 641 F.2d at 521.

Respondent's claim that the killing of defenseless civilians at Treblinka was part of the Nazi war effort, and therefore is political in character, is frivolous and offensive. In any event, mere simultaneity between the alleged murders at Treblinka and World War II is insufficient to render the offense "political" within the meaning of the Treaty. *See Eain v. Wilkes,* 641 F.2d at 521.

In another recent extradition case, involving members of the Provisional Irish Republican Army, the political offense exception to the Treaty of Extradition between the United States of America and the United Kingdom of Great Britain and Northern Ireland, 28 U.S.T. 227 (1977), was construed to require only

> that no act be regarded as political where the nature of the act is such as to be violative of international standards of civilized conduct. Surely an act which would be properly punishable even in the context of a declared war or in the heat of open military conflict cannot and should not receive recognition under the political exception to the Treaty.

Matter of the Requested Extradition of Joseph Patrick Thomas Doherty, 599 F. Supp. 270, 274 (S.D.N.Y. 1984).

The Court need not address at this time whether political offense exceptions in United States extradition treaties are to be interpreted as broadly as the *Doherty* court construes the exception. Nonetheless, it is clear that even this very inclusive definition of "political offense" does not include the crimes charged against Demjanjuk. The crimes alleged are inconsistent with international standards of civilized conduct. *Supra* at 21 [A60-A61].

The murdering of numerous civilians while a guard in a Nazi concentration camp, as part of a larger "Final Solution" to exterminate religious or ethnic groups, is not a crime of a "political character" and thus is not covered by the political offense exception to extradition. *Accord Artukovic, slip op.* at 6-7; *Doherty,* 599 F. Supp. at 274; *see also* Genocide Convention, Art. VII.

CONCLUSION

Pursuant to 18 U.S.C. § 3184, this Court certifies to the Secretary of State:

that the respondent, John Demjanjuk, the person who was brought before this Court, is the one named in the Israeli Extradition Request;

that the charges of "murder" contained in the Request to Issue Warrant of Arrest and the Warrant of Arrest are extraditable offenses pursuant to Articles II and III of the Treaty; and

that competent and sufficient evidence has been presented to sustain the charges of "murder" against respondent as set forth in the Request to Issue Warrant of Arrest and the Warrant of Arrest.

The bond granted to Demjanjuk by a United States Magistrate on November 18, 1983 is hereby revoked. Pur-

suant to 18 U.S.C. § 3184, respondent John Demjanjuk shall be committed to the custody of the United States Attorney General forthwith, pending the issuance of a Warrant of Surrender by the Secretary of State.

Surrender to the State of Israel is stayed until May 1, 1985 at 10:00 a.m. D.S.T. to afford respondent the opportunity to apply for whatever relief he deems appropriate.

IT IS SO ORDERED.

/s/ FRANK J. BATTISTI
Chief Judge

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed February 21, 1985)

Misc. No. 83-349

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF THE
EXTRADITION OF
JOHN DEMJANJUK
aka JOHN IVAN DEMJANJUK,
aka JOHN IVAN DEMYANYUK.

[603 F. Supp. 1468]
On Parameters of Extradition Hearing
March 5, 1985.
On Jurisdiction March 8, 1985.

United States Attorney, acting for and in behalf of government of Israel, filed complaint requesting a hearing to determine whether alleged war criminal was extraditable to Israel for war crimes allegedly occurring during World War II. The District Court, Battisti, Chief Judge, held that the District Court had subject-matter jurisdiction, and the matter was not required to be heard by a military tribunal.

So ordered.

See also, D.C., 584 F.Supp. 1321.

BATTISTI, *Chief Judge.*

On November 18, 1983 the United States Attorney for the Northern District of Ohio, acting for and in behalf of the government of Israel, filed a complaint requesting that this Court conduct a hearing to determine whether John Demjanjuk is extraditable to Israel, pursuant to the 1963 Extradition Treaty between the United States and Israel, T.I.A.S. 5476, 14 U.S.T. 1717. On December 17, 1984 oral argument in this matter was heard. One question addressed was "whether a United States civilian court has subject-matter jurisdiction in an extradition proceeding where the crimes alleged occurred during wartime or whether only a properly constituted military tribunal has jurisdiction over alleged war crimes?" *See* Order of December 6, 1984 at 4. 603 F.Supp. 1463, 1465.

Essentially, respondent argues that because he was a prisoner of war and a soldier and the crimes with which he is charged occurred during wartime, under international law and the United States Constitution, only a military tribunal may extradite him.[1] *In re Extradition of John Demjanjuk*, Transcript of December 17, 1984 Proceeding at 17, 20, 21-22, 23.

International law, the United States Constitution, federal statutes and prior judicial decisions do not support respondent's arguments. *See, e.g.*, Agreement by the Gov-

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1. Throughout the briefing and argument of this case, respondent has referred to the question of military tribunals as a "jurisdictional" issue. At times, this term has caused confusion given the statutory grant of jurisdiction in 18 U.S.C. § 3184. Hence, this court by statute does have subject matter jurisdiction in an extradition proceeding. However, respondent contends that not only must the court have subject matter jurisdiction over the extradition but it must also have jurisdiction over the subject matter of that extradition. In other words, the Court, respondent argues, must be authorized to determine cases involving alleged war crimes, which is the subject matter for which respondent's extradition is requested.

ernment of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement) arts. 4, 6, 59 Stat. 1544, E.A.S. No. 472 (August 8, 1945); United Nations Convention on the Prevention and Punishment of the Crime of Genocide art. 6, 78 U.N.T.S. 277 (*opened for signature* December 9, 1948); *In re Ryan,* 360 F.Supp. 270 (E.D.N.Y.1973), aff'd, 478 F.2d 1397 (2d Cir. 1977); *United States v. Canella,* 63 F.Supp. 377 (S.D.Cal. 1945). This Court, therefore, does have subject matter jurisdiction, pursuant to 18 U.S.C. § 3184, to conduct the instant extradition hearing.

In order to preserve the integrity of these proceedings and to remain responsive to respondent's concerns, the reasons for this ruling will be fully detailed in a forthcoming opinion. This Order has been entered today to give the parties as much time as possible to prepare for the § 3184 hearing.

The parties shall appear for respondent's extradition hearing on March 12, 1985 at 10 a.m.

IT IS SO ORDERED.

ON PARAMETERS OF EXTRADITION HEARING

On February 21, 1985 this Court held that it does have subject matter jurisdiction to hear and decide the instant extradition proceeding filed by the Petitioner United States of America [hereinafter referred to as the Government"], acting for and in behalf of the government of Israel. Order of February 21, 1985 at 2. In accordance with statements made during the February 9, 1984 Conference in

this action, this Order will set forth parameters of the extradition hearing scheduled for March 12, 1985. Transcript of February 9, 1984 Proceeding at 37.

I.

Title 18 U.S.C. § 3184 provides, in relevant part, that an extradition magistrate, acting pursuant to an extradition treaty or convention, may:

> . . . upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same together with a copy of all the testimony taken before him, to the Secretary of State, . . .

In an earlier Order, factors that must be examined in an extradition hearing were set forth. Order of December 6, 1984 at 1-2. An extradition certification is valid, if the following conditions are met:

> (1) The judge must be authorized to conduct extradition proceedings.
>
> (2) The judge must have jurisdiction of the subject matter and of the accused.
>
> (3) The applicable treaties must be in full force and effect.

(4) The crimes for which extradition is requested must be offenses "within the treaty".

(5) The judge must determine whether the party brought before it is the one named in the complaint. *Hooker v. Klein*, 573 F.2d 1360, 1367 (9th Cir.), *cert. denied*, 439 U.S. 932 [99 S.Ct. 323, 58 L.Ed.2d 327] (1978); *see also Fernandez v. Phillips*, 268 U.S. 311 [45 S.Ct. 541, 69 L.Ed. 970] (1925); *Charlton v. Kelly*, 229 U.S. 447 [33 S.Ct. 945, 57 L.Ed. 1274] (1913).

(6) There must be "competent and adequate evidence" for the decision.

Bingham v. Bradley, 241 U.S. 511, 516-17, 36 S.Ct. 634, 637-38, 60 L.Ed. 1136 (1916); *Jimenez v. Aristeguieta*, 311 F.2d 547, 562 (5th Cir.1962). Order of December 6, 1984 at 2.

Items 1, 2 and 3 have already been determined. Order of December 6, 1984 at 2; Order of February 21, 1985 at 2. Items 4, 5, and 6 will be considered at the March 12, 1985 hearing.

II.

The Court will consider the following issues in determining whether the crimes for which Demjanjuk's extradition is sought are offenses "within the treaty". 1963 Extradition Treaty between the United States and Israel, T.I.A.S. 5476, 14 U.S.T. 1717. (Item 4) (*See* Appendix for treaty provisions).

1. Does this Court have the authority, under the Extradition Treaty to extradite respondent to Israel where the Israeli government has charged him with crimes committed outside the territory of the State of Israel? (*i.e.* the "extraterritoriality" of the Extradition Treaty?)

a. Is the judicial determination of whether respondent is extraditable for the offenses charged discretionary under Article III of the Treaty because the Israeli statute under which respondent is charged asserts jurisdiction over acts which occurred outside the territory of Israel?

b. Do the laws of the United States, the requested party, provide for the punishment of similar offenses, within the meaning of Article III of the Treaty?

2. Does the extradition request fall into one of the exceptions to extradition set forth in the Treaty?

a. Is the article VI § 1 "double jeopardy" provision applicable in the instant case?

b. Is the extradition request time-barred under article VI § 3?

c. Is extradition prohibited by article VI § 4 because respondent is charged with crimes allegedly of a "political character"?

d. Do the death penalty provisions of the Nazi and Nazi Collaborators Law 5710-1950 bar extradition?

3. What effect, if any, does Israel's lack of statehood during the time the alleged crimes occurred have on whether the respondent is extraditable under the Treaty?

4. Is the Nazi and Nazi Collaborators Law an ex post facto law? If so, of what import is such a determination in these extradition proceedings?

III.

The Government will be permitted to submit properly authenticated documents, eyewitness affidavits or deposi-

tions, warrants, and other pertinent documents. *See* 18 U.S.C. § 3190; United States-Israel Extradition Treaty art. 10. The Government may also present live expert testimony as to Items 4, 5 and 6, if it so chooses.

Respondent will be permitted to present expert testimony and documentary evidence regarding the applicability of the United States-Israeli Extradition Treaty to his extradition (Item 4). He may present eyewitness or expert testimony and documentary evidence as to whether he is the person named in the Israeli Warrant (Item 5). He may, however, only present "explanatory" evidence, not "contradictory" evidence. Order of December 6, 1984 at 2-3.

On or before March 12, 1985 at 10:00 a.m., the parties will provide the Court with a list of expected witnesses, and state in detail the scope of their testimony and its relevance to the issues raised, as well as a list of the documents they wish to offer into evidence.

Amicus Curiae. The International Human Rights Law Group, is asked to argue as to whether it is consistent with international law for the State of Israel to try and punish persons accused of having committed certain acts outside of its territory before the adoption of the statute purporting to provide for such criminal jurisdiction. The parties may present oral argument and proffer expert testimony as to this issue.

IV.

An extradition court's role is limited to determining "whether there is competent evidence to justify holding the accused to await trial, and not to determine whether the evidence is sufficient to justify a conviction" *Collins v.*

Loisel, 259 U.S. 309, 316, 42 S.Ct. 469, 472, 66 L.Ed. 956 (1922). Evidence presented by the petitioner must only be sufficient to establish "probable cause". *Fernandez v. Phillips*, 268 U.S. 311, 312, 45 S.Ct. 541, 542, 69 L.Ed. 970 (1925); *Shapiro v. Ferrandina*, 478 F.2d 894, 900-01, (2d Cir.1973).

At the extradition hearing, respondent may not offer any evidence regarding the authenticity of the "Trawniki card" admitted into evidence during the denaturalization proceeding conducted by this Court in 1981. *See* Respondent's Explanatory Case History at 3-13 (April 2, 1984).

First, while the Israeli *Request for Extradition of John Demjanjuk* (May 18, 1983) does include the 1981 denaturalization opinion, *United States v. Demjanjuk*, 518 F.Supp. 1362 (1981), the Request does not directly or necessarily rely on the "Trawniki card". At the December 17, 1984 hearing, the Government's counsel explicitly stated that the eyewitness affidavits included as part of the Request were sufficient in themselves, apart from those affidavits incorporated via the denaturalization decision to support the extradition request. Transcript of December 17, 1984 Proceedings at 53-55 ("December Proceeding").

Second, in an extradition proceeding respondent may not introduce evidence offered to contradict the Government's proof. *Collins v. Loisel*, 259 U.S. at 315-17, 42 S.Ct. at 471-72; *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir. 1978). Even if Israel had offered the "Trawniki card" as evidence, to the extent that respondent is alleging that it is fraudulent, respondent is attempting to introduce impermissible "contradictory" evidence.

Third, respondent's pleadings present no new evidence to support his allegations as to the "Trawniki card". *See*,

e.g. Explanatory Case History (April 2, 1984); *Reply to Government's Prehearing Memorandum* (May 24, 1984). Both this Court, in the context of the denaturalization proceedings, and the immigration officials who have conducted the hearing and appeal pertaining to the deportation of John Demjanjuk have repeatedly examined respondent's allegations pertaining to irregularities in the "Trawniki Card" and found these allegations to be without merit. *In Re: John Demjanjuk in Deportation Proceedings* (February 14, 1985; File A8-237-417 Cleveland); *United States v. Demjanjuk,* 518 F.Supp. 1362 (N.D. Ohio, 1981) (denaturalization decision; motion for a new trial denied); *United States v. Demjanjuk,* 103 F.R.D. 1 (N.D. Ohio 1983) (First Motion to Vacate denied); *United States v. Demjanjuk* (N.D.Ohio, February 12, 1985) (Second Motion to Vacate denied).

To engage in another examination of the "Trawniki Card's" validity would not only be a pointless exercise which would only establish what has already been demonstrated numerous times before but would also be an attempted attack on evidence submitted in nonextradition proceedings (*e.g.* deportation, denaturalization). This collateral attack is not within the purview of an extradition proceeding as defined by statute, treaty, or case law.[1] This extradition hearing will not be converted into a trial on the merits, *see, e.g., Matter of Sindona,* 450 F.Supp. 672, 678 (S.D.N.Y.1978), *aff'd* 619 F.2d 167 (2d Cir.1980), or a review of prior decisions concerning the respondent.

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1. The collateral estoppel doctrine has not been automatically applied in this case. Perhaps had respondent in his two motions to vacate or in other papers made any showing that the "Trawniki Card' was not authentic, the Court in the interests of justice and in truly extraordinary circumstances would not have been constrained by procedural doctrines. In other words, the Court might have examined the card's authenticity in an extradition proceeding. But this is not the case here.

V.

This Court will determine the admissibility of the proffered expert testimony and decide any other evidentiary issues as they arise during the course of the § 3184 extradition hearing. These decisions are solely within the sound discretion of the extradition judge. *Hooker v. Klein*, 573 F.2d at 1369.

The parties shall appear for the extradition hearing on March 12, 1985 at 10:00 a.m.

IT IS SO ORDERED.

APPENDIX

The Extradition Treaty provides, in relevant part:

Article II.

Persons shall be delivered up according to the provisions of the present Convention for prosecution when they have been charged with, or to undergo sentence when they have been convicted of, any of the following offenses:

1. Murder.
2. Manslaughter.
3. Malicious wounding.

Extradition shall also be granted for attempts to commit or conspiracy to commit any of the offenses mentioned in this Article provided such attempts or such conspiracy are punishable under the laws of both Parties by a term of imprisonment exceeding three years.

Extradition shall also be granted for participation in any of the offenses mentioned in this Article.

Article III.

When the offense has been committed outside the territorial jurisdiction of the requesting Party, extradition need not be granted unless the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances.

Article VI.

Extradition shall not be granted in any of the following circumstances:

1. When the person whose surrender is sought is being proceeded against, or has been tried and discharged or punished, in the territory of the requested Party for the offense for which his extradition is requested. . . .

3. When the prosecution of the enforcement of the penalty for the offense has become barred by lapse of time according to the laws of the requesting Party or would be barred by lapse of time according to the laws of the requested Party had the offense been committed in its territory.

4. When the offense is regarded by the requested Party as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him for an offense of a political character.

Article VII.

When the offense for which the extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused unless the requesting Party provides such

assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

ON JURISDICTION

On December 17, 1984, oral argument was heard in this case on the following question:

"Whether a United States civilian court has subject-matter jurisdiction in an extradition proceeding where the crimes alleged occurred during wartime or whether only a properly constituted military tribunal has jurisdiction over alleged war crimes?" *Order of December 6, 1984* at 4.

On February 21, 1985, in a brief, order this Court found that it had subject matter jurisdiction to hear and decide the instant extradition proceeding. This opinion more fully presents the reasons for that decision.

I.

Throughout the briefing and argument of this case, respondent has referred to the question of military tribunals as a "jurisdictional issue". At times, this term has caused confusion because 18 U.S.C. § 3184 explicitly grants jurisdiction to federal courts in extradition proceedings.[1]

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1. 18 U.S.C. § 3184 reads in pertinent part: Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered.

The statute, therefore, has resolved the only jurisdictional issue this Court is required to answer. Counsel for respondent, however, has insisted that the extradition action cannot proceed because of the special nature of the charges against the respondent.

Although respondent has nowhere set out his views in a clear and logical progression, this Court interprets the argument he makes to be as follows. Respondent acknowledges that § 3184 enables a United States judicial officer to hear extradition matters. *In Re Extradition of John Demjanjuk,* Transcript of December 17, 1984 Proceedings at 23 [hereinafter referred to as "December Proceeding"]. Respondent argues, however, that while there is an extradition treaty in force between Israel and the United States, this treaty does not give a United States district court § 3184 jurisdiction in this matter because of the "subject matter" of the extradition. December Proceedings at 17. He contends that in determining jurisdiction, the judicial officer must examine the charge, specifically the type of conduct for which extradition is sought. If the conduct charged is "war crimes or genocide,"[2] respondent contends a civilian court lacks jurisdiction.[3] He argues that Article 1 of the United States

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2. It should be noted that the court does not today find that the alleged conduct respondent is accused of constitutes war crimes or genocide. In fact, the United States government on behalf of the State of Israel has formally charged respondent with murder, manslaughter and malicious wounding. Petitioner's Complaint at 1 (November 18, 1983); December Proceeding at 41-44, 47.

3. In addition, respondent alleges that extradition for "war crimes or genocide" does not fall within the U.S.-Israeli extradition treaty and that "had the United States chosen to make extradition for war crimes or genocide the law of the land" it would have done so through ratification of "the genocide convention" and implementing legislation. December Proceeding at 21-22. These arguments are essentially questions of treaty interpretation and will not be addressed at this point. *See* Order of December 6, 1984 at 1, Appendix.

Constitution gives Congress the exclusive power to regulate the land and naval forces and that Congress has authorized military tribunals to try "war criminals" exclusively. December Proceeding at 23, 21-22, 20. Respondent claims that "a determination has been made historically in this country based on international law and comity, that the rules of land warfare and the punishment of men in uniform will always take place in front of a military tribunal." December Proceeding at 13. Respondent asserts that "a man in uniform" has never been tried by a civilian tribunal in the history of the United States. December Proceeding at 13-14. *See also* Respondent's Reply to Government's Prehearing Memorandum (May 24, 1984) at 10-13. Thus, respondent concludes that this Court lacks subject matter jurisdiction in this proceeding.

For the reasons set forth below, respondent's arguments and conclusion are erroneous.

II.

Respondent's interpretation of domestic law, both cases and statutes, is misplaced on at least two grounds. First, this is an extradition proceeding and not a civil or criminal trial on the merits. Second, neither the United States Constitution nor statutes vest exclusive jurisdiction in military tribunals for so-called "war crimes". Each of these conclusions will be examined below.

A.

No American cases have been reported or found in which a civilian court found that it lacked jurisdiction to preside over an extradition proceeding because the "subject matter" of the extradition charge was alleged "war

crimes". In the few reported United States judicial decisions addressing requests to extradite persons for so-called war crimes, courts have not found that they lack jurisdiction to determine extraditability.

In *In re Ryan,* 360 F.Supp. 270 (E.D.N.Y.1973), *aff'd,* 478 F.2d 1397 (2d Cir.1973), the Federal Republic of Germany requested the extradition of a naturalized American citizen, Hermine Braunsteiner Ryan, pursuant to a 1931 treaty. 360 F.Supp. at 272 (United States-Germany Treaty of Extradition, 47 Stat.1862, T.S. 836). The petitioner alleged that Ryan had been a warden at the Lublin concentration camp in Poland during World War II. She was charged with multiple counts of murder in Germany. A United States district court judge exercised jurisdiction pursuant to 18 U.S.C. § 3184 and certified to the Secretary of State that the evidence presented was sufficient to sustain the charges under the Extradition Treaty. Ryan was eventually surrendered to the government of West Germany, where she stood trial and was found guilty of war crimes and sentenced to life imprisonment in June of 1981. *See* Moeller, United States Treatment of Alleged Nazi War Criminals: International Law, Immigration Law and the Need for International Cooperation at 12 (draft manuscript, to be published in 10 *Yale J.Int'l L.* (1985)).

In another case, the extradition of Andrija Artukovic for the crime of "murder" is sought by Yugoslavia. On March 5, 1985, a United States magistrate exercised jurisdiction pursuant to 18 U.S.C. § 3184 and certified that Artukovic is extraditable to Yugoslavia for a murder committed during World War II. *In the Matter of the Extradition of Andrija Artukovic,* CV84-8743 (C.D.Cal. March 5, 1985); *Artukovic v. Boyle,* 107 F.Supp. 11 (S.D.Cal. 1952), *rev'd sub nom., Ivancevic v. Artukovic,* 211 F.2d

565 (9th Cir.1954), *cert.denied,* 348 U.S. 818, 75 S.Ct. 28, 99 L.Ed. 645 (1954), *remanded,* 140 F.Supp. 245 (S.D.Cal. 1956), *aff'd sub nom., Karadzole v. Artukovic,* 247 F.2d 198 (9th Cir.1957), *vacated,* 355 U.S. 393, 78 S.Ct. 381, 2 L.Ed.2d 356 (1958), *remanded sub nom., United States v. Artukovic,* 170 F.Supp. 383 (S.D.Cal.1959). Extradition proceedings against Artukovic were originally initiated in 1951. Artukovic was accused of ordering the killings of thousands of persons while a high ranking official in a puppet government installed by the Nazi regime which controlled much of prewar Yugoslavia during World War II. Artukovic was found nonextraditable in 1959 because of insufficient evidence and the "political character" of the alleged offenses. Pursuant to Yugoslavia's second extradition request, petitioner United States of America filed a second extradition complaint on November 14, 1984. In the course of these proceedings, none of the federal courts which examined Artukovic's extraditability even questioned whether they could assert jurisdiction in an extradition proceeding because the crimes alleged were war-related. *See also In the Matter of the Requested Extradition of Joseph Patrick Thomas Doherty,* 599 F.Supp. 270, 274 (S.D.N.Y.1984).

B.

Neither the United States Constitution nor United States legislation provides that crimes committed by military personnel, crimes which violate the laws of war, or crimes related to the conduct of war must be tried before military authorities. The Supreme Court has characterized as "well-established" the power of military tribunals to exercise jurisdiction over enemy belligerents, prisoners of war and others charged with violating the laws of war. *Johnson v. Eisentrager,* 339 U.S. 763, 786, 70 S.Ct. 936, 947,

94 L.Ed. 1255 (1950). The Supreme Court, however, has never stated or implied that such jurisdiction is exclusive. *See id.* ("the Military Commission is *a* lawful tribunal to adjudge enemy offenses against the laws of war.") (emphasis added).

Article I, Section 8, clause 14 of the United States Constitution grants Congress the power to "make Rules for the Government and Regulations of the land and naval Forces. Article I, section 8, clause 10 gives Congress the power to "define and punish. . . Offenses against the Law of Nations," of which the law of war is a part. Pursuant to these constitutional provisions, Congress may have the power to vest exclusive jurisdiction over crimes relating to war in military tribunals. This issue, however, need not be reached in the instant case. Congress has not enacted legislation intended to give military authorities exclusive jurisdiction over war-related crimes, let alone over persons accused of murder, manslaughter and causing grievous bodily harm during wartime while at a Nazi concentration camp.

Congress historically has granted military authorities the power to establish military tribunals to try enemy nationals accused of war crimes. Articles of War, 10 U.S.C. §§ 1471-1593 (repealed in part, incorporated in part, 10 U.S.C. §§ 801-835 (1948, 1950). Nonetheless, this jurisdictional grant was not intended to be exclusive. The Articles of War provided that courts martial would have concurrent jurisdiction with other military tribunals in certain instances. *Accord In re Yamashita,* 327 U.S. 1, 7-8, 66 S.Ct. 340, 344-345, 90 L.Ed. 499 (1946). *See also* 10 U.S.C. § 821 (1950). Indeed, during the time the Articles of War were in effect, Congress had authorized federal district courts to try certain war-related offenses. Espionage

Act of 1917, 40 Stat. 219 (repealed 1948). *Cf. Ex Parte Quirin* 317 U.S. 1, 27, 63 S.Ct. 1, 10, 87 L.Ed. 3 (1942). *See also Government v. M'Gregory et al.*, 14 Mass. 499 (1780) (prisoners of war are subject to prosecution for offenses *malum in se;* although they may be tried by courts martial, they may also be tried by courts of general jurisdiction in the country in which the crime is committed).

No United States cases have been found which specifically address civilian court jurisdiction over "war crimes". Nonetheless, courts have examined the related issue of civilian court jurisdiction over American military personnel whom Congress has subjected to the jurisdiction of courts martial. During the Civil War, World War I, and World War II periods, courts have found that civil courts have jurisdiction concurrent with military tribunals. *United States v. Canella,* 63 F.Supp. 377, 381-82 (S.D.Cal.1945). They have held that civilian courts may try a member of the armed forces for an offense which is punishable by a military court, if the civilian court has taken jurisdiction first or if the military consents. 63 F.Supp. at 381. *See also Kennedy v. Sanford,* 166 F.2d 568 (5th Cir.1948), *cert. denied,* 333 U.S. 864, 68 S.Ct. 737, 92 L.Ed. 1143 (1948), (Articles of War provide for concurrent jurisdiction over an American soldier, even during war time; commanding officer has discretion regarding the surrender of a soldier for crimes against federal or state laws); *Scott v. State,* 247 Ala. 62, 22 So.2d 529 (1945) (state court properly asserted jurisdiction over defendant member of the armed forces during time of war for crime of robbery, when military authorities did not request surrender of the accused); *People v. Denman,* 179 Cal. 497, 177 P. 461 (1918) (felony murder charge brought against American soldier who committed crime during time of war properly brought in state court).

The cases cited above clearly illustrate that Congress has not provided nor have courts found that military tribunals or courts martial have exclusive jurisdiction over military matters or crimes related to the conduct of war. The United States government has never surrendered control of civilian affairs to the army, in peace time. *United States v. Canella,* 63 F.Supp. at 383. Americans have historically been very cautious about giving the military powers beyond those that it needs to maintain the security of the United States. *Id.* at 383-84; *Coleman v. Tennessee,* 7 Otto 509, 97 U.S. 509, 24 L.Ed. 1118 (1878).

Israel has charged John Demjanjuk of murdering "tens of thousands" of persons while operating the gas chambers of the Tremblinka death camp. There is no reason why jurisdiction to try John Demjanjuk should be vested exclusively in an American military tribunal. Indeed, no American military tribunal presently exists to try persons accused of "war crimes". Congress certainly did not intend for persons physically present in the United States who are accused of "war crimes" to be able to avoid trial and punishment because no American court had jurisdiction to hear an extradition request. If respondent is found extraditable under 18 U.S.C. § 3184, it would not be consistent with American policy, as reflected in this nation's participation in the Nuremberg trials, to shield him from extradition. *Matter of Doherty,* 599 F.Supp. at 274.

C.

Respondent, contending that "military law is regarded as entirely separate" from civilian law, cites several Supreme Court decisions which are inapposite to the instant case. Respondent's Reply to Government's Prehearing Memorandum at 10-13. December Proceeding at 10-14, 15, 17, 19-22. *In re Yamashita,* 327 U.S. 1, 66 S.Ct. 340, and

Ex parte Quirin, 317 U.S. 1, 63 S.Ct. 1, both involve habeas corpus proceedings initiated by petitioners tried by military commissions for alleged crimes growing out of their actions during World War Two.[4] In neither case did the Supreme Court address whether a civilian tribunal could have asserted original jurisdiction in these cases. *See also Johnson v. Eisentrager*, 339 U.S. at 786, 70 S.Ct. at 947. In both cases, the Supreme Court found that its scope of review was limited to the authority and jurisdiction of the military commissions. As the Court said in *In re Yamashita*, 327 U.S. at 8, 66 S.Ct. at 344.

> We also emphasized in *Ex parte Quirin*, as we do here, that on application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. *We consider here only the lawful power of the commission to try the petitioner for the offense charged.* In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court. See *Ex parte Vallandigham*, 1 Wall. 243 [17 L.Ed. 589]; *In re Vidal*, 179 U.S. 126 [21 S.Ct. 48, 45 L.Ed. 118]; cf. *Ex parte Quirin*, . . . (emphasis added).

The Court held that the detention of General Yamashita and the *Quirin* petitioners for trial and upon conviction, subject to the prescribed review by the military authorities, was lawful. Contrary to respondent's assertions, *see e.g.*, Respondent's Reply to Government's Prehearing Mem-

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4. *In re Yamashita* involved the trial of the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Phillipine Islands, 327 U.S. at 5, 66 S.Ct. at 343. *Ex parte Quirin* involved the trial of German spies and saboteurs arrested in the United States for actions during World War II. 327 U.S. at 4, 66 S.Ct. at 343.

orandum, these Supreme Court decisions addressing the appealability of military tribunal decisions do not limit the jurisdiction of this Court to proceed with the instant extradition proceeding.

III.

Respondent's argument that international law provides that trials of military personnel for war crimes will always take place before a military tribunal also lacks merit. International law[5] is a part of the law of the United States to be applied by this Court. *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900). Respondent, however, has not met his burden of proving his contention that if a civilian court tries him for alleged war crimes, a violation of international law would occur. *Accord id.*

First, the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (*opened for signature* December 9, 1948) was adopted by the United Nations General Assembly in 1948, G.A.Res. 260(A), U.N. Doc. A/810 at 174 (1948) and has been ratified by 93 nations. The Convention defines genocide to include various acts, including killing, committed "with intent to destroy . . . a national, ethnical, racial or religious group" and "confirms" that genocide is a punishable crime under international law. Article 6 provides that both national courts and a supranational tribunal, as yet

5. "International law" develops from a number of sources, including treaties and conventions, international declarations and charters, and the customs and usages of civilized nations. *Cf.* Statute of the International Court of Justice Art. 38(1), (San Francisco, June 26, 1945). *See* Akehurst, "The Hierarchy of Sources of International Law" (Brit.Y.B.Int'l L. 273, 275-76 (1974-75); Tunkin, "Coexistence and International Law", 3 Recueil des Cours 1, 21 (1958); Schacter, "The Evolving International Law of Development", 15 Colum.J.Transnat'l L. 1, 3 (1976), *Texas Overseas Petroleum et al. v. Libyan Arab Republic*, 17 I.L.M. 1 (1978); and *The Paquete Habana*, 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900).

uncreated, have the power to try persons charged with genocide. *See also* G.A.Res. 3074, 28 U.N.GAOR Supp. (No. 30) at 78, U.N.Doc. A/9030 (1973) (sets forth principles regarding international cooperation in the extradition and punishment of war criminals, including the right of each state to try its own war criminals). While this Convention may not have a binding effect on nations, such as the United States, which have not ratified it, it does not support respondent's contentions.

Second, at the end of World War II, the wartime Allies agreed to prosecute accused "war criminals" for "atrocities, massacres and executions" which occurred during the war. The "major war criminals" were tried by an International Military Tribunal. The Nuremberg Trial 6 F.R.D. 69 (1946). The agreements reached between the Allies, however, explicitly provided that "national courts" had jurisdiction to try "war criminals." Moscow Declaration of German Atrocities 9 Dep't State Bull. 310 (November 1, 1943) (signed by Roosevelt, Churchill, Stalin); Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and North Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Avis (London Agreement) arts. 4, 6, 59 Stat. 1544, E.A.S. No. 472 (August 8, 1945).[6] Whether the agreements reflect international law at the time of agreement or begin to create a new standard, they indicate that international law does not prohibit the trial of alleged war criminals before national civil tribunals.

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6. Art. 6 provides: Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals.

Third, the practice of several European nations in the years following World War II also shows that the trial of war criminals by non-military courts is widely accepted in international practice. Since World War Two, a number of European countries have tried alleged perpetrators of various "war crimes" or "crimes against humanity" in their civilian courts. Civilian courts in Norway and Sweden asserted jurisdiction over Nazi war criminals in instances where their own municipal law was violated. *See* Appleman, *Military Tribunals and International Crimes* (1954) at 307. Poland's civilian tribunals also asserted jurisdiction over war criminals. *See id.* at 3008. *See also* December Proceeding at 33; Ruckerl, *The Investigation of Nazi Crimes 1945-1978* at 31 (1979) (tr. Rutter). Indeed, during the period from 1944 to 1948, the United States extradited over 1,200 alleged Nazi war criminals from the American zones of occupied Germany and Austria to European nations, including Norway, Denmark and Poland. December Proceeding at 33. *See also* 1947 Report of Colonel Streight, U.S. Army, to Judge Advocate General, U.S. Army, at Appendix.

French law currently provides for trying and punishing the perpetrators of both "war crimes" and "crimes against humanity" in civilian courts. A French civilian court, for example, is presiding over the pending prosecution of Klaus Barbie, allegedly a former Gestapo chief. Bolivia expelled Barbie to France in 1983. French prosecutors have charged Barbie with "crimes against humanity" for the part he played in the torture, deportation and murder of several thousand Jews and non-Jews during World War II. *See* Goldberg, "Klaus Barbie and the the United States Government", 19 *Harv.C.R.-C.L.L.Rev.* 1 (1984); Moeller, *supra*, at 1.

In addition to trials in the civilian courts of the Allied powers, civil courts in occupied Germany and later in

the Federal Republic of Germany have tried thousands of people accused of "war crimes" and crimes against humanity committed during the Nazi era. Appleman, *supra*, at X; Ruckerl . . ., *supra*, at 32-71; December Proceeding at 35. *See also In re Ryan*, 360 F.Supp. 270; *Re Federal Republic of Germany and Rauca*, 141 D.L.R.3d 412, 30 C.R.3d 97, 38 O.R.2d 705 (1982) (extradition by Canada to West Germany of Rauca, to stand trial for war crimes committed during World War II). No evience has been presented that the "customs and usages of civilized nations", *The Paquete Habana*, 175 U.S. 700, 20 S.Ct. 299, prohibit civilian courts from exercising jurisdiction over war-related crimes.

IV.

Respondent's arguments have not shown that this Court lacks subject matter jurisdiction to proceed with an extradition hearing in the above captioned case. Clearly, the accused cannot choose the tribunal in which he is to be tried. *See, e.g. People v. Denman*, 177 P. at 502; *State v. Inman*, 224 N.C. 531, 541, 31 S.E.2d 641, 648 (1944).

The State of Israel has requested respondent Ivan Demjanjuk's extradition, pursuant to the 1963 Convention on Extradition between the Government of the United States of America and the Government of the State of Israel. T.I.A.S. 5476, 14 U.S.T. 717. This Court has personal jurisdiction over Respondent. Title 18 U.S.C. § 3184, therefore, imposes a responsibility on this Court to proceed with an extradition hearing forthwith.

Thus, the § 3184 hearing in the instant case shall go forward at 10:00 a.m. on March 12, 1985.

IT IS SO ORDERED.

ORDER OF THE UNITED STATES DISTRICT COURT

(Dated December 6, 1984; Supplemental Order dated December 11, 1984)

Misc. No. 83-349

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF THE
EXTRADITION OF
JOHN DEMJANJUK
aka JOHN IVAN DEMJANJUK,
aka JOHN IVAN DEMYANYUK.

[603 F. Supp. 1463]

In matter of an extradition for alleged war crimes, the District Court, Frank J. Battisti, Chief Judge, held that parties could only address issues of whether a United States civilian court has subject-matter jurisdiction in extradition proceeding where crimes alleged occurred during wartime or whether only a properly constituted military tribunal has jurisdiction over alleged war crimes, and what evidence was relied upon by State of Israel to establish that requested individual was indeed the respondent.

Order accordingly.

See also, D.C., 584 F.Supp. 1321, D.C., 603 F.Supp. 1468.

ORDER

BATTISTI, *Chief Judge.*

On July 17, 1984, this Court ordered that it would continue with the extradition proceedings against respondent John Demjanjuk despite the entry of a deportation order against respondent. In order to clarify the issues to be resolved at the extradition hearing required by 18 U.S.C. § 3184, this Court will hold a preliminary hearing on December 17, 1984, at 10 a.m. The purpose of this hearing is to give the parties an opportunity to present arguments on several issues which the Court would like to resolve prior to the actual extradition hearing. To insure the orderly and expeditious handling of the preliminary hearing, the parties may only address the issues and questions outlined below.

The purpose of an extradition hearing is to determine whether there is sufficient evidence of criminality "to sustain the charge under the provisions of the proper treaty or convention." 18 U.S.C. § 3184. The judge need not find that the evidence is sufficient to convict the individual whose extradition is sought but only whether there is "probable cause" or "reasonable grounds" to believe the individual is guilty of the crime charged. *Fernandez v. Phillips,* 268 U.S. 311, 312, 45 S.Ct. 541, 542, 69 L.Ed. 970 (1925); *Shapiro v. Fernandina,* 478 F.2d 894, 904-05, 913-14 (2d Cir.), *cert. dismissed,* 414 U.S. 884, 94 S.Ct. 204, 38 L.Ed.2d 133 (1973). For such a determination to be valid (to survive collateral review under habeas corpus) the following conditions must be met:

(1) The judge must be authorized to conduct extradition proceedings.

(2) The judge must have jurisdiction of the subject matter and of the accused.

(3) The applicable treaties must be in full force and effect.

(4) The crimes for which extradition is requested must be offenses "within the treaty".

(5) The judge must determine whether the party brought before it is the one named in the complaint. *Hooker v. Klein* 573 F.2d 1360, 1367 (9th Cir.), *cert. denied,* 439 U.S. 932 [99 S.Ct. 323, 58 L.Ed.2d 327] (1978); *see also Fernandez v. Phillips,* 268 U.S. 311 [45 S.Ct. 541, 69 L.Ed. 970] (1925); *Charlton v. Kelly,* 229 U.S. 447 [33 S.Ct. 945, 57 L.Ed. 1274] (1913).

(6) There must be "competent and adequate evidence" for the decision.

Bingham v. Bradley, 241 U.S. 511, 516-17, 36 S.Ct. 634, 637-38, 60 L.Ed. 1136 (1916); *Jimenez v. Aristequieta,* 311 F.2d 547, 562 (5th Cir.1962).

It is already well-established that a federal district judge is authorized to conduct extradition proceedings. Under 18 U.S.C. § 3184, "any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of general jurisdiction of any State" may conduct extradition proceedings. It is also established that a valid extradition treaty is currently in force between the United States and Israel. Convention on Extradition between the Government or the United States of America and the Government of the State of Israel. T.I.A.S. 5476, 14 U.S.T. 1717 (signed Dec. 10, 1962) (entered into force Dec. 5, 1963). Therefore, this Court has already determined items 1 and 3.

As to item 6 above, it is well-established that in an extradition hearing, the respondent may not present evidence which contradicts the requesting government's proof; the respondent may only present explanatory evidence. *Hooker v. Klein*, 573 F.2d 1360, 1369 (9th Cir.), *cert. denied*, 439 U.S. 932, 99 S.Ct. 323, 58 L.Ed.2d 327 (1978); *Collins v. Loisel*, 259 U.S. 309, 315-17, 42 S.Ct. 469, 471-72, 66 L.Ed. 956 (1922). The distinction between explanatory and contradictory evidence is difficult to articulate, *see In re Sindona*, 450 F.Supp. 672, 685 (S.D.N.Y.1978), *aff'd* 619 F.2d 167 (2nd Cir.1980), but it is essentially the line between "evidence rebutting probable cause and evidence in defense." *Charlton v. Kelly*, 229 U.S. 447, 33 S.Ct. 945, 57 L.Ed. 1274 (1913). Thus, the extraditing court may exclude evidence of alibi. *Hooker*, 573 F.2d at 1368. The determination of what evidence is explanatory and therefore admissible is left to the sound discretion of the extradition judge. *Hooker*, 573 F.2d at 1369; *Collins*, 259 U.S. at 317, 42 S.Ct. at 472. Above all, the Court will be guided by the principle that an extradition hearing is not to be turned into a full-scale trial on the merits.

Under 18 U.S.C. § 3191, the respondent may present witnesses in his behalf. However, the testimony of such witnesses shall be limited to the standard stated above. The governments of the United States or Israel need not present witnesses and may use the means provided by 18 U.S.C. § 3190. *See Bingham v. Bradley*, 241 U.S. 511, 36 S.Ct. 634, 60 L.Ed. 1136 (1916). The provisions of § 3190 are not available to respondent. *Oteiza v. Jacobus*, 136 U.S. 330, 10 S.Ct. 1031, 34 L.Ed. 464 (1890).

If respondent wishes to present expert testimony on the issue of whether the Treaty is inapplicable to him because the alleged crimes fall exclusively within the

purview of the military courts, he may do so.[1] Respondent may only present expert witness(es) who respondent has proposed calling to testify in papers already filed with the Court. On December 17, 1984, expert testimony will be limited to the military tribunal issue (question A, p. 1465 *infra*). If respondent intends to offer the testimony of Professor Telford Taylor, on or before December 17, 1984 at 10:00 a.m., respondent will present to the Court a written memorandum setting forth the expected testimony of Proffessor Taylor. Said memorandum will explicate respondent's statement in his May 21, 1984 memorandum that Professor Taylor will testify as to "[t]he jurisdiction of an extradition court over alleged war crimes will be fully explored under domestic and international law." Objections to the scope of proffered expert testimony on the military tribunal issue will be entertained at the December 17, 1984 hearing.

Items 2, 4 and 5 in the above list remain to be resolved. The questions to be addressed at the December 17, 1984 preliminary hearing go only to items 2 and 5 above, namely jurisdiction and identification. No discussion of item 4, broadly referred to as "treaty interpretation," will occur at the December 17th hearing. (See Appendix A)

The Court will therefore hear argument on the following questions on December 17, 1984:

A. Under item 2 above, whether a United States civilian court has subject-matter jurisdiction in an extradition proceeding where the crimes alleged occurred during wartime or whether only a properly constituted military tribunal has jurisdiction over alleged war crimes?

---

1. The Court is today ruling only on the question of the admissibility of expert testimony on the military tribunal issue (question A, p. 1465 *infra*). The issue of what, if any, witnesses will be permitted to testify at a subsequent hearing, if such hearing is necessary, will be decided at a later date.

B. Under item 5 above, what evidence is relied upon by the state of Israel to establish that the requested individual is indeed the respondent? What evidence is sufficient to determine the identity of the respondent?

IT IS SO ORDERED.

APPENDIX A

The Extradition Treaty provides, in part:

Article II

Persons shall be delivered up according to the provisions of the present Convention for prosecution when they have been charged with, or to undergo sentence when they have been convicted of, any of the following offenses:

1. Murder.

2. Manslaughter.

3. Malicious wounding; inflicting grievous bodily harm . . .

Extradition shall also be granted for attempts to commit or conspiracy to commit any of the offenses mentioned in this Article provided such attempts or such conspiracy are punishable under the laws of both Parties by a term of imprisonment exceeding three years.

Extradition shall also be granted for participation in any of the offenses mentioned in this Article.

Article III

When the offense has been committed outside the territorial jurisdiction of the requesting Party, extradition need not be granted unless the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances.

Under the rubric of "treaty interpretation", the Court places the following issues:

1. Does this Court have the authority, under the Extradition Treaty, to extradite respondent to Israel when the Israeli government is charging him with crimes committed outside the territory of the State of Israel? (*i.e.* the "extraterritoriality" of the Extradition Treaty?)

a. Is the judicial determination of whether respondent is extraditable for the offenses charged discretionary under Article III of the Treaty because the law under which respondent is charged asserts jurisdiction over acts which occurred outside the territory of Israel?

b. Do the laws of the United States, the requested party, provide for the punishment of offenses committed in similar circumstances, within the meaning of Article III of the Treaty?

2. Does the extradition request fall into one of the exceptions to extradition set forth in the Treaty?

Article VI of Treaty provides, in part:

Extradition shall not be granted in any of the following circumstances:

1. When the person whose surrender is sought is being proceeded against, or has been tried and discharged or punished, in the territory of the requested Party for the offense for which his extradition is requested. . . .

3. When the prosecution of the enforcement of the penalty for the offense has become barred by lapse of time according to the laws of the requesting Party or would be barred by lapse of time according to the laws of the requested Party had the offense been committed in its territory.

4. When the offense is regarded by the requested Party as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him for an offense of a political character.

Article VII of the Treaty provides:

When the offense for which the extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused unless the requesting Party provides such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

a. Is the § 1 "double jeopardy" provision applicable in the instant case?

b. Is the extradition request time-barred under § 3?

c. Is extradition prohibited by § 4 because respondent is charged with crimes of a "political character" in Israel?

d. Do the death penalty provisions of the Nazi and Nazi Collaborators (Punishment) Law 5710-1950 bar extradition?

3. What, if any, effect does Israel's lack of statehood during the time the alleged crimes occured have on whether the respondent is extraditable under the Treaty?

4. Is the Nazi and Nazi Collaborators (Punishment) Laws 5710 an ex post facto law? If so, of what import is such a determination in these extradition proceedings?

This list is not exhaustive and there may be subsidiary questions under each enumerated issue. This list is

intended solely to outlime those issues which will not be addressed at the December 17, 1984 hearing.

SUPPLEMENTAL ORDER

On Thursday, December 6, 1984, this Court issued an order outlining questions to be addressed at the December 17, 1984 preliminary hearing in the above-captioned case. Upon further consideration, this Court believes that one additional question should be addressed prior to the actual extradition hearing.

Both the Extradition Treaty[1] and 18 U.S.C. § 3184[2] require the presiding judge to base his extradition determination upon certain and specific criminal charges. The Court is unable to determine with certainty the specific charges against respondent for which extradition is sought.

---

1. Article I of the Extradition Treaty provides:

> Each Contracting Party agrees, under the conditions and circumstances established by the present Convention, reciprocally to deliver up persons found in its territory *who have been charged with* or convicted of *any of the offenses mentioned in Article II* of the present Convention committed within the territorial jurisdiction of the other, or outside thereof under the conditions specified in Article III of the present Convention. (emphasis added)

Convention on Extradition between the Government of the United States of America and the Government of the State of Israel, December 10, 1962, 14 U.S.T. 1717, T.I.A.S. No. 5476.

Article XIII of the Extradition Treaty states that a person extradited under the Treaty "shall not be detained, tried or punished in the territory of the requesting Party for any offense other than that for which extradition has been granted . . ." and provides for certain limited exceptions. *See also* Article 10 of the Extradition Treaty.

2. As set out in 18 U.S.C. § 3184, an extradition request comes before an extradition magistrate for the determination of certain specific questions. *See* Order of December 6, 1984, at 1-2. Under Section 3814 a complaint made under oath to an extradition magistrate must charge respondent with having committed within the jurisdiction of the requesting state "any of the crimes provided for by . . . [the extradition] treaty or convention."

In the November 18, 1983 Complaint, the United States Government stated that Demjanjuk is charged with "the said crimes of murder and malicious wounding". Other documents before the Court have set out the charges somewhat differently. In the November 3, 1983 Authentication Certificate attached to Israel's Request for the Extradition of John Demjanjuk, James E. Hughes, Counsel General of the United States in Tel Aviv, Israel, states that Israel is requesting respondent Demjanjuk's extradition for the alleged crime of "Murder of Jews." The October 18, 1983 Request to Issue Warrant of Arrest, included in the Israeli Request, sets forth the charges against Demjanjuk and the statutory authority for the charges:

> Details of the offense(s): The suspect, nicknamed "Ivan the Terrible", was a member of the S.S., and in the years 1942-43 operated the gas chambers to exterminate prisoners at the Treblinka death camp in the Lublin area of Poland, which was occupied by the Nazis during the Second World War. The suspect murdered tens of thousands of Jews, as well as non-Jews, killing them, injuring them, causing them serious bodily and mental harm and subjected them to living conditions calculated to bring about their physical destruction. The suspect committed these acts with the intention of destroying the Jewish people and to commit crimes against humanity.
>
> Paragraph(s) of the charges: Paragraphs 1, 2, 3, and 4 of the Nazi and Nazi Collaborators (Punishment) Law, 5710-1950.

Furthermore, the papers of the parties and the *amicus curiae* differ in their interpretations of the charges on which the government seeks to extradite the respondent. *See, e.g.*, Respondent's Motion to Terminate Extradition

Proceedings (April 12, 1984) at 25-31; Brief of Amicus Curiae (April 19, 1984), at 25-31; Government's Pre-Hearing Memorandum (April 19, 1984) at 16, 34-36.

Therefore, in the interests of clarity and orderliness, the Government is ordered to set forth in a specific and detailed manner the criminal charges against Demjanjuk for which it seeks extradition, on or before December 17, 1984 at 10:00 a.m.

This statement of the charges will be considered the definitive and official request by the Government. The charges set forth therein will be considered the official submission which this Court will use in all future decisions regarding the crimes for which Demjanjuk's extradition is requested.

IT IS SO ORDERED.

COMPLAINT OF THE UNITED STATES

(Filed November 18, 1983)

Misc. No. 83-349

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN THE MATTER OF THE EXTRADITION OF JOHN DEMJANJUK aka John Ivan Demjanjuk, aka John Ivan Demyanyuk,

A Fugitive from the justice of Israel

COMPLAINT

TO: Honorable Frank J. Battisti, Chief
United States District Judge
Northern District of Ohio

Your Complainant, the United States Attorney for the Northern District of Ohio, under oath deposes and says:

That, in the above matter, he acts for and in behalf of the government of Israel;

That he is informed, through diplomatic channels, that one John Demjanjuk, who currently resides at 847 Meadow Lane, Seven Hills, Ohio, is duly and legally charged with having committed the crimes of murder and malicious wounding; inflicting grievous bodily harm.

That the said John Demjanjuk cannot be served in Israel and that the said John Demjanjuk has sought an asylum within the jurisdiction of the United States and

may be found in the State of Ohio and the Northern District of Ohio.

That the said crimes of murder and malicious wounding which the said John Demjanjuk is charged with having committed is among the offenses enumerated in Article II of the 1967 Treaty between the United States and Israel. 18 UST 382; TIAS 6246, which treaty still is in full force and effect; that the said Article II particularly refers to and includes the crimes of murder and malicious wounding; inflicting grievous bodily harm.

That, through diplomatic channels, your complainant is informed and believes that the requisition for the hereinnamed fugitive, John Demjanjuk, has been made in conformance with said treaty and other treaties in force and effect accompanied by the formal papers upon which the demand for extradition is founded; that your complainant herewith presents the formal extradition papers to the Court;

Whereupon, your petitioner, the complainant herein, acting under the authority and in the behalf stated, prays the consideration of this petition and that a warrant may issue for the arrest of the said John Demjanjuk charged as aforesaid; that he may be brought before this Court to the end that evidence of criminality may be heard and, if on such hearing, this Court determines the evidence sufficient to sustain the charge under the provisions of said treaty and treaties, this Court shall certify the same to the Secretary of State of the United States at Washington, D.C. in order that warrant may issue upon the requisition of the proper authority of said foreign government for the surrender of the said John Demjanjuk according to the stipulations of said treaty and treaties, and for such other action as this Court is required under

the provisions of said treaty and treaties and the laws of the United States to take.

/s/ J. WILLIAM PETRO
United States Attorney
Northern District of Ohio

MURRAY R. STEIN
Associate Director
Office of International Affairs

ALVIN D. LODISH
U. S. Department of Justice

DISTRICT OF COLUMBIA, ss:

DECLARATION OF JEFFREY H. SMITH

I, Jeffrey H. Smith, declare and say as follows:

1. I am an Assistant Legal Adviser in the Office of the Legal Adviser for the Department of State, Washington, D.C. This office has responsibility for extradition requests, and I am charged with the extradition case of John Demjanjuk.

2. In accordance with the provisions of the extradition treaty in full force and effect between the United States and Israel, the Embassy of Israel has submitted a diplomatic note dated November 9, 1983, formally requesting Mr. Demjanjuk's extradition. A copy of the diplomatic note is attached to this declaration.

3. The relevant and applicable treaty provisions in full force and effect between the United States and Israel are found in the Treaty between the United States of America and Israel of December 10, 1962, which entered into force on December 5, 1963 (TIAS 5476). A copy of the Treaty is attached to this declaration.

4. In accordance with Article XVIII of the Treaty, the Government of the United States courts for the State of Israel in its extradition requests, and the State of Israel provides legal representation in its courts for extradition requests made by the United States.

5. The offense for which Mr. Demjanjuk's extradition is covered by Article 2 of the Treaty on Extradition between the United States and Israel.

I, Jeffrey H. Smith, do this 17th day of November, 1983, affirm under the penalty of perjury that to the best of my knowledge the foregoing is true and accurate.

/s/ JEFFREY H. SMITH
Jeffrey H. Smith

Attachments:

1. Copy of note.
2. Copy of treaty.

EMBASSY OF ISRAEL

WASHINGTON, D.C.

9 November 1983

The Embassy of Israel presents its compliments to the Department of State and has the honor to submit a request for the extradition of John Demjanjuk.

The Embassy of Israel avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

No. 83/13060

UNITED STATES OF AMERICA

[SEAL]

DEPARTMENT OF STATE

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

I Certify That Jeffrey H. Smith, whose name is subscribed to the document hereunto annexed, was at the time subscribing the same Assistant Legal Adviser, Office of the Legal Adviser, Department of State, United States of America, and that full faith and credit are due to his acts as such.

In testimony whereof, I, George P. Shultz,

Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Acting Authentication Officer of the said Department, at the city of Washington, in the District of Columbia, this seventeenth day of November, 1983.

/s/ GEORGE P. SHULTZ
Secretary of State.

By /s/ JOAN C. HAMPTON
Acting Authentication Officer,
Department of State.

"J"

ISRAEL POLICE

To: The Magistrate Court
in Jerusalem

Unit
Date: 18 Oct. 83
File No. PI/1699

REQUEST TO ISSUE WARRANT OF ARREST

No.	I.D. No.	Family Name	First Name	Father's Name	Date of Birth	Address
1		Demyanyuk	John Ivan	Nikola	3 April 1920	U.S.A.
2						
3						
4						

Details of the offense(s): The suspect, nicknamed "Ivan the Terrible", was a member of the S.S., and in the years 1942-1943 operated the gas chambers to exterminate prisoners at the Treblinka death camp in the Lublin area of Poland, which was occupied by the Nazis during the Second World War. The suspect murdered tens of thousands of Jews, as well as non-Jews, killing them, injuring them, causing them serious bodily and mental harm and subjected them to living conditions calculated to bring about their physical destruction. The suspect committed these acts with the intention of destroying the Jewish people and to commit crimes against humanity.

Paragraph(s) of the charges: Paragraphs 1, 2, 3, and 4 of the Nazi and Nazi Collaborators (Punishment) Law, 5710-1950.

Inasmuch as there is a reasonable basis for presuming that the abovenamed person committed the offenses with which he is charged, his arrest is necessary for the purpose of the Request for Extradition which the State of Israel is about to submit to the American authorities in order

to assure his detention until the American authorities decide on the matter of his extradition.

For the above reasons, I hereby request that a Warrant of Arrest be issued against the abovenamed person.

I am opposed to his release.

/s/ Menachem Russek
Signature of the Requesting Officer

For Use of the Court:

On the 18th October 1983, at 11:30, there appeared before me Deputy Inspector Menachem Russek, Officer No. 4067, and declared under oath that the content of the above request is true and correct and he added: The Israel Police possesses testimony of eye-witnesses who are in Israel attributing to the abovenamed person the offenses specified above, and the Israel Police also possess copies of the transcript of testimony which was heard before the Federal Court in Ohio, U.S.A., which testimony was used as the basis for the Order revoking the U.S. citizenship of the suspect which had been fraudulently obtained by him.

Response of the Suspect: ---

Decision: John Ivan Demjanjuk will be arrested and brought before a judge as soon as possible after he is located and brought to Israel.

(Seal of the Court)

Signature of Judge (-)

A. M. Simcha
Chief Judge

Translation from
the Hebrew

STATE OF ISRAEL

Arrest File BS ...../83
Criminal Register No. ..... Criminal File ...../....
Criminal Appeal ...../....
PI/1699

WARRANT OF ARREST

In the Magistrates Court of Jerusalem
An Order is hereby given to arrest ..... Additional identification/ Foreign Passport
Identity Number

Demjanjuk	John Ivan	Nikola	03 / 04 / 20
Surname	First Name	Father's name	Date of Birth day/month/year

Address: Presently in the United States

Suspected of: Crimes against the Nazi and Nazi Collaborators (Punishment) Law, 5710-1950

This order will be executed by policeman ..... who is permitted to carry it out in any place and at any time.

X The arrested person is to be brought before a judge as soon as possible after he is located and brought to Israel

.... Until Judgment is given in trial/in the above appeal

Date order was given:
18 / 10 / 83
day/month/year

A. M. Simcha
(Judge, Registrar)

(Seal of the Court)

Certificate of Accuracy of Translation

I, Marvin E. Hankin, holder of Israel Identity Number 6552526 after being sworn to tell the truth, do hereby state under oath as follows:

1. I have a fluent knowledge of the Hebrew and English languages.

2. I hereby certify that I have prepared the translations to English, of the "Request to Issue Warrant of Arrest" and of the "Warrant of Arrest" which are attached hereto, from the original Hebrew documents.

3. I further certify that these are true and correct translations to English of the said documents.

/s/ MARVIN E. HANKIN
Marvin E. Hankin

AUTHENTICATION

I, Dr. Joseph B. Ben Or, First Senior Assistant State Attorney, an official of the Israel Ministry of Justice, hereby certify that on the 28th day of October, 1983, there appeared before me Marvin E. Hankin, who is known to me personally, and after being warned by me of his duty under law to state the truth and of the penalties provided by law if he does not do so, he made the above Certification of Accuracy of Translation under oath and signed it before me.

Done at Jerusalem, this 28th day of October, 1983

.....

Dr. Joseph B. Ben Or

TREATIES AND OTHER INTERNATIONAL ACTS SERIES 5476

(Reprint of English text only)

[14 U.S.T. 1717]

EXTRADITION

Convention Between the
UNITED STATES OF AMERICA
and ISRAEL

Signed at Washington
December 10, 1962

[SEAL]

CONVENTION ON EXTRADITION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE STATE OF ISRAEL

The Government of the United States of America and the Government of the State of Israel, desiring to make more effective the cooperation of the two countries in the repression of crime, agree as follows:

ARTICLE I

Each Contracting Party agrees, under the conditions and circumstances established by the present Convention, reciprocally to deliver up persons found in its territory who have been charged with or convicted of any of the offenses mentioned in Article II of the present Convention committed within the territorial jurisdiction of the other, or outside thereof under the conditions specified in Article III of the present Convention.

Article II

Persons shall be delivered up according to the provisions of the present Convention for prosecution when they have been charged with, or to undergo sentence when they have been convicted of, any of the following offenses:

1. Murder.

2. Manslaughter.

3. Malicious wounding; inflicting grievous bodily harm.

4. Rape.

5. Abortion.

6. Unlawful carnal knowledge of a girl under the age specified by the laws of both the requesting and requested Parties.

7. Procuration.

8. Willful non-support or willful abandonment of a minor or other dependent person when the life of that minor or that dependent person is or is likely to be injured or endangered.

9. Kidnapping; abduction; false imprisonment.

10. Robbery.

11. Burglary; housebreaking.

12. Larceny.

13. Embezzlement.

14. Obtaining money, valuable securities or goods by false pretenses or by threats or force.

15. Bribery.

16. Extortion.

17. Receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained.

18. Fraud by a bailee, banker, agent, factor, trustee, executor, administrator or by a director or officer of any company.

19. Forgery, including forgery of banknotes, or uttering what is forged.

20. The forgery or false making of official documents or public records of the government or public authority or the uttering or fraudulent use of the same.

21. The making or the utterance, circulation or fraudulent use of counterfeit money or counterfeit seals, stamps, dies and marks of the government or public authority.

22. Knowingly and without lawful authority making or having in possession any instrument, tool, or machine adapted and intended for the counterfeiting of money, whether coin or paper.

23. Perjury; subordnation of perjury.

24. Arson.

25. Any malicious act done with intent to endanger the safety of any persons travelling upon a railway.

26. Piracy, by the law of nations; mutiny on board a vessel for the purpose of rebelling against the authority of the Captain or Commander of such vessel; by fraud or violence taking possession of such vessel.

27. Malicious injury to property.

28. Smuggling.

29. False swearing.

30. Offenses against the bankruptcy laws.

31. Offenses against the laws relating to dangerous drugs.

Extradition shall be granted for any of the offenses numbered 27 through 31 only if the offense is punishable under the laws of both Parties by a term of imprisonment exceeding three years.

Extradition shall also be granted for attempts to commit or conspiracy to commit any of the offenses mentioned in this Article provided such attempts or such conspiracy are punishable under the laws of both Parties by a term of imprisonment exceeding three years.

Extradition shall also be granted for participation in any of the offenses mentioned in this Article.

ARTICLE III

When the offense has been committed outside the territorial jurisdiction of the requesting Party, extradition need not be granted unless the laws of the requested Party provide for the punishment of such an offense committed in similar circumstances.

The words "territorial jurisdiction" as used in this Article and in Article I of the present Convention mean: territory, including territorial waters, and the airspace thereover belonging to or under the control of one of the Contracting Parties, and vessels and aircraft belonging to one of the Contracting Parties or to a citizen or corporation thereof when such vessel is on the high seas or such aircraft is over the high seas.

ARTICLE IV

A requested Party shall not decline to extradite a person sought because such person is a national of the requested Party.

Article V

Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, either to justify his committal for trial if the offense of which he is accused had been committed in that place or to prove that he is the identical person convicted by the courts of the requesting Party.

Article VI

Extradition shall not be granted in any of the following circumstances:

1. When the person whose surrender is sought is being proceeded against, or has been tried and discharged or punished, in the territory of the requested Party for the offense for which his extradition is requested.

2. When the person whose surrender is sought has been tried and acquitted, or undergone his punishment, in a third State for the offense for which his extradition is requested.

3. When the prosecution or the enforcement of the penalty for the offense has become barred by lapse of time according to the laws of the requesting Party or would be barred by lapse of time according to the laws of the requested Party had the offense been committed in its territory.

4. When the offense is regarded by the requested Party as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him for an offense of a political character.

ARTICLE VII

When the offense for which the extradition is requested is punishable by death under the laws of the requesting Party and the laws of the requested Party do not permit such punishment for that offense, extradition may be refused unless the requesting Party provides such assurances as the requested Party considers sufficient that the death penalty shall not be imposed, or, if imposed, shall not be executed.

ARTICLE VIII

When the person whose extradition is requested is being proceeded against or is serving a sentence in the territory of the requested Party for an offense other than that for which extradition has been requested, his surrender may be deferred until the conclusion of the proceedings and the full execution of any punishment he may be or may have been awarded.

ARTICLE IX

The determination that extradition based upon the request therefor should or should not be granted shall be made in accordance with the domestic law of the requested Party and the person whose extradition is sought shall have the right to use such remedies and recourses as are provided by such law.

ARTICLE X

The request for extradition shall be made through the diplomatic channel.

The request shall be accompanied by a description of the person sought, a statement of the facts of the case,

the text of the applicable laws of the requesting Party including the law prescribing the punishment for the offense as well as the law relating to the limitation of the legal proceedings or the enforcement of the penalty for the offense.

When the request relates to a person who has not yet been convicted, it must also be accompanied by a warrant of arrest issued by a judge or commissioner of the requesting Party and by such evidence as, according to the laws of the requested Party, would justify his arrest if the offense had been committed there.

When the request relates to a person already convicted, it must be accompanied by the judgment of conviction and sentence passed against him in the territory of the requesting Party and by a statement showing how much of the sentence has not been served.

The warrant of arrest and depositions or other evidence, given under oath, and the judicial documents establishing the existence of the conviction, or certified copies of these documents, shall be admitted in evidence in the examination of the request for extradition, when, in the case of a request emanating from Israel, they bear the signature or are accompanied by the attestation of a judge, magistrate or other official or are authenticated by the official seal of the Ministry of Justice and, in any case, are certified by the principal diplomatic or consular officer of the United States in Israel, or when, in the case of a request emanating from the United States, they are authenticated by the official seal of the Department of State.

The documents in support of the request for extradiction shall be accompanied by a certified translation thereof into the language of the requested Party.

Article XI

In case of urgency a Contracting Party may apply for the provisional arrest of the person sought pending the presentation of the request for extradition through the diplomatic channel. The application shall contain a description of the person sought, an indication of intention to request the extradition of the person sought and a statement of the existence of a warrant of arrest or a judgment of conviction against that person, and such further information, if any, as would be necessary to justify the issue of a warrant of arrest had the offense been committed, or the person sought been convicted, in the territory of the requested Party.

On receipt of such an application the requested Party shall take the necessary steps to secure the arrest of the person claimed.

A person arrested upon such an application shall be set at liberty upon the expiration of sixty days from the date of his arrest, if a request for his extradition accompanied by the documents specified in Article X shall not have been received. However, this stipulation shall not prevent the institution of proceedings with a view to extraditing the person sought if the request is subsequently received.

Article XII

If the requested Party requires additional evidence or information to enable it to decide on the request for extradition, such evidence or information shall be submitted to it within such time as that Party shall require.

If the person sought is under arrest and the additional evidence or information submitted as aforesaid is not sufficient or if such evidence or information is not received

within the period specified by the requested Party, he shall be discharged from custody. However, such discharge shall not bar the requesting Party from submitting another request in respect of the same offense.

ARTICLE XIII

A person extradited under the present Convention shall not be detained, tried or punished in the territory of the requesting Party for any offense other than that for which extradition has been granted nor be extradited by that Party to a third State unless:

1. He has left the territory of the requesting Party after his extradition and has voluntarily returned to it;

2. He has not left the territory of the requesting Party within 60 days after being free to do so; or

3. The requested Party has consented to his detention, trial, punishment or extradition to a third State for an offense other than that for which extradition was granted.

These stipulations shall not apply to offenses committed after the extradition.

ARTICLE XIV

A requested Party upon receiving two or more requests for the extradition of the same person either for the same offense, or for different offenses, shall determine to which of the requesting States it will extradite the person sought, taking into consideration the circumstances and particularly the possibility of a later extradition between the requesting States, the seriousness of each offense, the place where the offense was committed, the nationality of the person sought, the dates upon which the requests were received and the provisions of any extradition

agreements between the requested Party and the other requesting State or States.

ARTICLE XV

The requested Party shall promptly communicate to the requesting Party through the diplomatic channel the decision on the request for extradition.

If extradition is granted, the person sought shall be conveyed by the authorities of the requested Party to the frontier or port of embarkation or airport in the territory of that Party which the diplomatic or consular agent of the requesting Party shall designate.

If a warrant or order for the extradition of a person sought has been issued by the competent authority and he is not removed from the territory of the requested Party within such time as may be prescribed by the laws of that Party, he may be set at liberty and the requested Party may subsequently refuse to extradite that person for the same offense.

ARTICLE XVI

To the extent permitted under the law of the requested Party and subject to the rights of third parties, which shall be duly respected, all articles acquired as a result of the offense or which may be required as evidence shall, if found, be surrendered if extradition is granted.

ARTICLE XVII

The right to transport through the territory of one of the Contracting Parties a person surrendered to the other Contracting Party by a third State shall be granted on request made through the diplomatic channel accompanied by the documents referred to in Article X of the present

Convention provided that conditions are present which would warrant extradition of such person by the State of transit and reasons of public order are not opposed to the transit.

The Party to which the person has been extradited shall reimburse the Party through whose territory such person is transported for any expenses incurred by the latter in connection with such transportation.

Article XVIII

Expenses related to the transportation of the person sought shall be paid by the requesting Party. The appropriate legal officers of the country in which the extradition proceedings take place shall, by all legal means within their power, assist the officers of the requesting Party before the respective judges and magistrates. No pecuniary claim, arising out of the arrest, detention, examination and surrender of persons sought under the terms of this Convention, shall be made by the requested Party against the requesting Party other than as specified in the second paragraph of this Article and other than for the lodging, maintenance and board of the person sought.

The legal officers, other officers of the requested Party, and court stenographers, if any, of the requested Party who shall, in the usual course of their duty, give assistance and who receive no salary or compensation other than specific fees for services performed, shall be entitled to receive from the requesting Party the usual payment for such acts or services performed by them in the same manner and to the same amount as though such acts or services had been performed in ordinary criminal proceedings under the laws of the country of which they are officers.

ARTICLE XIX

This Convention shall be ratified and the ratifications shall be exchanged in Israel as soon as possible.

This Convention shall enter into force upon the exchange of ratifications. It may be terminated by either Contracting Party giving notice of termination to the other Contracting Party at any time and the termination shall be effective six months after the date of receipt of such notice.

IN WITNESS WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE in duplicate at Washington this tenth day of December, one thousand nine hundred sixty-two, corresponding to the thirteenth day of Kislev, five thousand seven hundred and twenty-three, in the English and Hebrew languages, both versions being equally authentic.

FOR THE GOVERNMENT OF THE UNITED STATES OF AMERICA:
DEAN RUSK

FOR THE GOVERNMENT OF THE STATE OF ISRAEL:
AVRAHAM HARMAN.

NAZIS AND NAZI COLLABORATORS (PUNISHMENT) LAW, 5710—1950*

1. (a) A person who has committed one of the following offences —

(1) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against the Jewish people;

(2) done, during the period of the Nazi regime, in an enemy country, an act constituting a crime against humanity;

(3) done, during the period of the Second World War, in an enemy country, an act constituting a war crime,

is liable to the death penalty.

(b) In this section —

"crime against the Jewish people" means any of the following acts, committed with intent to destroy the Jewish people in whole or in part:

(1) killing Jews;

(2) causing serious bodily or mental harm to Jews;

(3) placing Jews in living conditions calculated to bring about their physical destruction;

(4) imposing measures intended to prevent births among Jews;

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*Passed by the Knesset on the 18th Av, 5710 (1st August, 1950) and published in *Sefer Ha-Chukkim* No. 57 of the 26th Av, 5710 (9th August, 1950), p. 281; the Bill and an Explanatory Note were published in *Hatza'ot Chok* No. 36 of the 11th Adar, 5710 (28th February, 1950), p. 119.

(5) forcibly transferring Jewish children to another national or religious group;

(6) destroying or desecrating Jewish religious or cultural assets or values;

(7) inciting to hatred of Jews;

"crime against humanity" means any of the following acts:

murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds;

"war crime" means any of the following acts:

murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity.

2. If a person, during the period of the Nazi regime, committed in an enemy country an act by which, had he committed it in Israel territory, he would have become guilty of an offence under one of the following sections of the Criminal Code, and he committed the act against a persecuted person as a persecuted person he shall be guilty of an offence under this Law and be liable to the same punishment to which he would have been liable had he committed the act in Israel territory:

(*a*) section 152 (rape, sexual and unnatural offences);

(*b*) section 153 (rape by deception);

(*c*) section 157 (indecent act with force, etc.);

(*d*) section 188 (child stealing);

(*e*) section 212 (manslaughter);

(*f*) section 214 (murder);

(*g*) section 222 (attempt to murder);

(*h*) section 235 (acts intended to cause grievous harm or prevent arrests);

(*i*) section 236 (preventing escape from wreck);

(*j*) section 238 (grievous harm);

(*k*) section 240 (maliciously administering poison with intent to harm);

(*l*) section 256 (abducting in order to murder);

(*m*) section 258 (abducting in order to subject person to grievous hurt);

(*n*) section 288 (robbery and attempted robbery);

(*o*) section 293 (demanding property with menaces with intent to steal).

3. (a) A person who, during the period of the Nazi regime, in an enemy country, was a member of, or held any post or exercised any function in, an enemy organisation is liable to imprisonment for a term not exceeding seven years.

(b) In this section, "enemy organisation" means —

(1) a body of persons which, under article 9 of the Charter of the International Military Tribunal, annexed to the Four-Power Agreement of the 8th August, 1945, on the trial of the major war criminals, has been declared, by a judgment of that Tribunal, to be a criminal organisation;

(2) any other body of persons which existed in an enemy country and the object or one of the objects of which was to carry out or assist in carrying out actions of an enemy administration directed against persecuted persons.

4. (a) A person who, during the period of the Nazi regime, in an enemy country and while exercising some function in a place of confinement on behalf of an enemy administration or of the person in charge of that place of confinement, committed in that place of confinement an act against a persecuted person by which, had he committed it in Israel territory, he would have become guilty of an offence under one of the following sections of the Criminal Code, shall be guilty of an offence under this Law and be liable to the same punishment to which he would have been liable had he committed the act in Israel territory:

(1) section 100 (c) (threatening violence);

(2) section 162 (procuring defilement of females by threats, fraud or administering drugs);

(3) section 241 (wounding and similar acts);

(4) section 242 (failure to supply necessaries);

(5) section 249 (common assault);

(6) section 250 (assault causing actual bodily harm);

(7) section 261 (unlawful compulsory labour);

(8) section 270 (theft).

(b) "Place of confinement", in this section, means any place in an enemy country which, by order of an enemy administration, was assigned to persecuted persons, and includes any part of such a place.

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16. In this Law —

"the period of the Nazi regime" means the period which began on the 3rd Shevat, 5693 (30th January, 1933) and ended on the 25th Iyar, 5705 (8th May, 1945);

"the period of the Second World War" means the period which began on the 17th Elul, 5699 (1st September, 1939) and ended on the 5th Elul 5705 (14th August, 1945);

"the Allied Powers" means the states which signed the Declaration of the United Nations of the 1st January, 1942, or acceded to it during the period of the Second World War;

"Axis state" means a state which during the whole or part of the period of the Second World War was at war with the Allied Powers; the period which began on the day of the beginning of the state of war between a particular Axis state and the first, in time, of the Allied Powers and ended on the day of the cessation of hostilities between that state and the last, in time, of the Allied Powers, shall be considered as the period of the war between that state and the Allied Powers;

"enemy country" means —

(*a*) Germany during the period of the Nazi regime;

(*b*) any other Axis state during the period of the war between it and the Allied Powers;

(*c*) any territory which, during the whole or part of the period of the Nazi regime, was *de facto* un-

der German rule, for the time during which it was *de facto* under German rule as aforesaid;

(*d*) any territory which was *de facto* under the rule of any other Axis state during the whole or part of the period of the war between it and the Allied Powers, for the time during which that territory was *de facto* under the rule of that Axis state as aforesaid;

"enemy administration" means the administration which existed in an enemy country;

"persecuted person" means a person belonging to a national, racial, religious or political group which was persecuted by an enemy administration;

"the Criminal Code" means the Criminal Code Ordinance, 1936[1]).

17. The Minister of Justice is charged with the implementation of this Law.

DAVID BEN-GURION — *Prime Minister*

PINCHAS ROSEN — *Minister of Justice*

YOSEF SPRINZAK
Chairman of the Knesset
Acting President of the State

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1) P.G. No. 652 of the 14th December, 1936, Suppl. I, p. 285 (English Edition). *LSI* vol. II, p. 115.